CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NEW ORLEANS.

NOVEMBER, 1878.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,
HON. A. DEBLANC,
*HON. W. B. EGAN,
HON. W. B. SPENCER,
} *Associate Justices.*

No. 6920.

EDWARD J. GAY & CO. vs. FRANCIS W. PIKE.

Where two creditors holding the promissory notes of their debtor secured by one mortgage on the latter's plantation, sue on their notes and obtain personal judgments, and each seizes under a *fi. fa.* the crop grown on the plantation, and the proceeds of the crop are held (under an agreement between the seizing creditors which makes no mention of any privilege or pledge on the crop claimed by either creditor) to await the adjudication of their claims under their seizures, the creditor making the first seizure will acquire a preference.

Contracts made with factors to give them a privilege or pledge on crops, must stipulate the sum to be secured by such privilege or pledge, and no further sum than that thus stipulated and fixed can be covered by such contracts to the prejudice of other creditors.

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Robert M. Sims for plaintiff and appellant.

Laurence A. Suthon for opponent and appellee.

The opinion of the court was delivered by

MARR, J. Mrs. M. M. Blanchard, wife of Lucius Suthon, sold half

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of a plantation in Assumption parish to Francis W. Pike, and for the deferred payments he executed three promissory notes, each for $3750, payable to her order, and secured by vendor's mortgage. She retained one of the notes, and indorsed two of them to Edward J. Gay & Co.

On the sixth of May, 1875, all these notes having matured, Mrs. Suthon brought suit on the one held by her; and, on the same day, on the answer and confession of Pike, judgment was rendered in her favor, with recognition of her mortgage rights; and on the twenty-seventh of May, Edward J. Gay & Co. brought suit on the two notes held by them, and on the same day they obtained judgment on the answer and confession of Pike, with recognition of their mortgage rights on the same property.

On the second of January, 1877, a writ of *fieri facias* issued on the judgment in favor of Mrs. Suthon, under which the sheriff seized, on the tenth of January, seventy-five hogsheads sugar, in the sugar-house of Pike; and on the twelfth of January, Edward J. Gay & Co. caused execution to issue on their judgment, under which the sheriff seized one hundred and one hogsheads sugar, including the seventy-five already seized under Mrs. Suthon's writ, and eighty-one barrels molasses, not seized under her writ.

By agreement of counsel representing both the seizing creditors, the seventy-five hogsheads seized by both were shipped by the sheriff to Edward J. Gay & Co., at New Orleans, "to be by them sold in the market, the proceeds of which shall be held by the said Gay & Co. to abide the decision of the court upon the claims of said Mrs. Suthon and said Gay & Co. for priority and preference to the said proceeds:" and on the twelfth March, the sheriff returned both writs, stating the seizure under each, the agreement, which he made part of his return, and that the proceeds of the seventy-five hogsheads, in the hands of Gay & Co., amounted to $6615 35.

On the eleventh May Mrs. Suthon filed a third opposition in the suit of Gay & Co. vs. Pike, in which she gave the history of the seizures, and the agreement, and claimed to be paid the amount of her judgment, in full, out of the proceeds of the seventy-five hogsheads, as first seizing creditor. Gay & Co. and the sheriff, parties to this petition of third opposition, excepted that the sheriff was without interest, and had no funds subject to his control. Gay & Co. also plead that the sugar in question, with the consent of opponent, was released from seizure by the sheriff and shipped to them, and by them sold, and proceeds retained subject to their lien, privilege, right of pledge and pawn, to pay and re-imburse them for advances made to Pike, in 1876, for the cultivation of the plantation, and the making and saving of the crop, under their agreement with Pike, of fifth February, 1876, recorded on the

same day in the parish in which the plantation is situated, and that these advances amounted to $12,744 70, on account of which Pike had paid them $4828 58, leaving balance due them $7916 12.

They also plead that the seizure by opponent, of the seventy-five hogsheads, was in violation of their rights, she well knowing that they had made all the advances to Pike, during the year 1876, to make and take off his crop, and that they were entitled to a privilege on the same to secure payment: and they prayed that the demand of opponent be dismissed, and that the superiority of their lien and privilege be recognized, and they be decreed entitled to retain the proceeds in their hands to pay and satisfy their claim.

It was admitted on the trial that the sheriff was without interest, and that the proceeds of the sugar had never been in his hands: and the suit was dismissed as to him. The district court maintained the opposition and claim of Mrs. Suthon, and decreed that her judgment be paid and satisfied out of the proceeds of the seventy-five hogsheads in the hands of Gay & Co.

There is no controversy about the account of Gay & Co., which is proven by several witnesses. The advances were made under a notarial contract, of date fifth February, 1876, by which Gay & Co. agreed to furnish Pike during the year supplies and money, not to exceed $4200, exclusive of interest, commissions, charges, and expenses, and Pike granted them a lien, privilege, pledge and pawn, on the growing crop, and obligated himself to ship it to Gay & Co. for their security, as provided by the act of 1874, p. 114.

When the seizure was made by Mrs. Suthon, if Gay & Co. had any superior right or claim to the property, they should have asserted it, contradictorily with her, by third opposition. Instead of doing this, they seized under their judgment; and the sugar in controversy went into their possession only under the agreement, subject to the rights of the seizing creditors respectively.

The notes and mortgage on which the judgments in favor of Mrs. Suthon and Gay & Co. respectively were rendered gave them no right of preference or privilege on the gathered crop; but the personal judgment, in favor of each of them, entitled them to seize any property of their debtor subject to execution. As the seizure by Mrs. Suthon was first in date, it gave her a right of preference, unless some fact or circumstance gave Gay & Co. a superior right. The terms of the agreement would seem to limit the question of preference to the effect of the respective seizures.

If it be conceded that Gay & Co., notwithstanding the agreement under which they obtained possession of the sugar seized, would have had the right, in virtue of their contract, to apply the proceeds to the

payment of their advances, the amount secured by the contract was expressly limited to $4200, exclusive of commissions, interest, etc.; and up to the eighteenth of December, 1876, they had received and sold sugar and molasses, and carried the proceeds, amounting to $4828 58, to the credit of Pike, as shown by their account current, made up to sixth March, 1877. In addition to this, they had the proceeds of the seventy-five hogsheads, $6615 35, and of twenty-six hogsheads sugar and eighty-one barrels molasses not seized by Mrs. Suthon, but seized under their judgment, on the twelfth January, 1877, no part of which figures in that account. The counsel of Gay & Co. argue that they had a pledge and pawn of the entire crop; and were entitled to retain the entire proceeds on account of their entire debts. This might have been true if there had been no special contract fixing the amount to be advanced and secured by pledge of the crop; and if Pike, their debtor, had shipped the entire crop to them, and they had received the shipment, or bill of lading or letter of advice before any seizure was made. But Pike did not ship the seventy-five hogsheads to them, and he could not have done so, because the sheriff had seized and taken them out of his possession; and he no longer had the right or the power to ship or otherwise to control them. The sheriff shipped the sugar in question for a specific purpose; and it would not have been shipped to Gay & Co. except under the agreement, and for the purpose specified. Mrs. Suthon had seized it, and Gay & Co. had seized it; and it was shipped to Gay & Co. by the sheriff, because the parties seizing so agreed. The sugar did not go into the possession of Gay & Co. as consignees or agents of Pike, their debtor, but as consignees of the sheriff, who was not their debtor; and they received it impressed with whatever right Mrs. Suthon had acquired by the seizure under her judgment, on the tenth January, 1877.

If Gay & Co. could be heard, under their agreement with Mrs. Suthon, to assert any right to the sugar in question other than that growing out of their seizure, it is certainly not that of the consignee, for the reasons already stated, and for the additional reason that that privilege is expressly subordinated to that of a creditor resident of the State, acquired before the consignor has received the goods, or a bill of lading, or a letter of advice, or invoice showing that they have been dispatched to him. R. C. C. art. 3247. It is not the privilege established by article 3217, in favor of the creditor for necessary supplies, and for money used for the purchase of supplies and for the payment of necessary expenses for any farm or plantation, because the constitution, article 123, declares that no privilege shall affect third parties unless recorded in the parish where the property is situated: and it is not that which the contract of fifth February, 1876, was intended to

secure, because the amount secured by that contract was limited; and the proceeds of the crop received and sold up to the eighteenth December, 1876, nearly a month before Mrs. Suthon's seizure, carried to the credit of Pike's account, amounted to $4828 58, or more than $600 in excess of the limit, excluding interest, commissions, etc.

A factor agreeing with a planter for future advances, can not always know exactly what amount the planter will need. The law requires, whatever be the form of the contract, mortgage, or pledge, that it mention the amount of the debt to be secured, and that it be recorded in the manner provided by law. R. C. C. article 3158. Manifestly, the whole object of recording would be defeated if the act of mortgage or privilege were allowed to secure any amount not limited. Therefore, in such cases, it is usual to fix the limit of the advances, not to exceed a certain amount. Up to the amount thus fixed the security would be good, if valid in other respects; but it can not be extended so as to cover any sum whatever beyond the limit fixed in the contract.

Mortgages to secure future advances are usually so drawn as to cover any deficiency in the crop or goods with reference to which the advances are to be made. But a pledge, or lien, or privilege on the goods or crop is different. It is not intended to secure a balance: the object is to secure the sum advanced, to obtain possession of the goods or crop, and to apply the proceeds to the payment. If the proceeds do not suffice to pay the debt, of course they can not secure the balance; because the balance is what remains unpaid after the proceeds have been exhausted; and in no event can the pledge, or lien, or privilege be extended, to the prejudice of other creditors, beyond the amount stated in the contract.

If the rights of the parties are to be determined by the contract of fifth February, 1876, the debt secured by that contract had been paid and extinguished more than twenty days before the seizure by Mrs. Suthon. If they depend upon the seizures, Mrs. Suthon's was two days in advance of that of Gay & Co. In any aspect of the case, the right of Mrs. Suthon to be paid, by privilege and preference out of the proceeds of the seventy-five hogsheads sugar in the hands of Edward J. Gay & Co., the special consignees and depositaries, seems clear beyond doubt or question; and we find no error in the judgment of the district court so decreeing.

The judgment appealed from is therefore affirmed with costs.

Rehearing refused.

No. 5869.

W. S. BENEDICT vs. J. A. FLORAT, TUTOR, ET AL.

The jurisdiction of the Second District Court for the parish of Orleans is exclusively probate, and it has no power to entertain a question of title to real estate claimed by majors alone.

A suit for the partition of property which belongs in part to minors, and in part to majors, does not fall within probate jurisdiction. It must be brought in a court of ordinary jurisdiction.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Francis W. Baker for plaintiff and appellant.

Saml. P. Blanc for Mrs. Fitzpatrick, appellee.

The opinion of the court was delivered by

MARR, J. Patrick McGuigin died in 1865, leaving a large estate, and seven children, minors, issue of his marriage with their deceased mother. The executors of his will liquidated the succession expeditiously, and in October, 1865, they filed their final account, and turned over a large amount in money and property to Jules A. Florat, the tutor of the minors.

Shortly after he took possession of the effects, as tutor, having a large sum in cash on hand, Florat obtained leave of court to invest it in real estate; and in December, 1865, he purchased, in the names of the minors, two lots of ground, with the buildings and improvements, on Tchoupitoulas, between Poydras and Natchez streets, for $30,209.

One of the heirs, George McGuigin, attained his majority in 1871. In 1873 he gave his note to Mrs. Fitzpatrick for $300, which he failed to pay at maturity. She obtained judgment against him, and, under execution the sheriff seized and sold his interest in the succession of his deceased father and mother, adjudicated to Mrs. Fitzpatrick, and by judgment of the Second District Court, in March, 1875, Mrs. Fitzpatrick was recognized as subrogee of George McGuigin, and put in possession as owner of his share in the succession.

In July, 1875, George McGuigin sold to W. S. Benedict his title and interest, one undivided seventh, in the property on Tchoupitoulas street, which he declared was not included in the sheriff's sale to Mrs. Fitzpatrick; and on the thirteenth November, 1875, Henry C. McGuigin, another of the heirs who attained his majority, sold to Benedict his interest, one undivided seventh, in the same property.

On the twenty-seventh November, 1875, Mrs. Fitzpatrick, claiming to be the owner of one seventh, the share of George McGuigin, in the succession, brought suit, in the Second District Court for a partition; and she made Henry C. McGuigin, and the minors McGuigin, represented by their tutor, parties.

On the same day Henry C. McGuigin brought suit, in the same court for a partition; and he made George McGuigin, the minors, and Mrs. Fitzpatrick and her husband parties.

On the third December, 1875, W. S. Benedict, claiming to be the owner of two sevenths of the Tchoupitoulas-street property, brought suit in the same court for partition; and he made the minors and Mrs. Fitzpatrick and her husband parties.

On motion of Florat, tutor, these three suits were consolidated, and judgment was rendered recognizing the parties as joint owners of the property: decreeing a sale for partition; and "reserving the antagonistic rights of all parties to be discussed in the partition of the mass."

Benedict moved for a new trial, mainly on the ground that the court should have passed on the conflicting titles, and no valid sale could be made until they were passed upon. The court ordered a new trial in the suit of Benedict only, that is, with respect to the Tchoupitoulas-street property alone; and in the suit of Benedict a judgment was rendered on the new trial, decreeing that this property be sold; and that the proceeds be held subject to the further order of the court.

Finally, in the suit of Benedict, a judgment was rendered in favor of Mrs. Fitzpatrick, against W. S. Benedict, decreeing the purchase made by her at sheriff's sale in February, 1875, to have included all the right and interest of George McGuigin in and to the undivided seventh of the Tchoupitoulas-street property; that the subsequent sale made by George McGuigin to Benedict, on the twenty-fourth July, 1875, was null and void owing to the previous sale of the same thing by the sheriff to Mrs. Fitzpatrick; "and further decreeing Mrs. Fitzpatrick to be entitled to the proceeds of said share in the partition had herein."

Benedict appealed from this judgment; and no other part of the case or controversy is before us for review. When the new trial was granted, the case of Benedict, in the suit brought by him, was separated from the other suits; a new trial was granted in his suit alone; a separate decree for the sale of the property, in which alone he was interested, was made; and the judgment appealed from was rendered in that suit between him and Mrs. Fitzpatrick alone, and it finally passed upon their respective rights and claims in and to the proceeds of that property alone. Our decree must be equally limited.

When the executors filed their final account, and the tutor took possession for the minors, of the entire residuum of the property and effects of the succession, the minors became co-proprietors; and the succession of Patrick McGuigin was closed.

When Florat, the tutor of the minors, by authority of the probate court, on the advice of the family meeting, invested their money, not the money of the succession, in the Tchoupitoulas-street property, and

took the title in the names of the minors, not in the name of the succession, the minors became co-proprietors of that property, as they were co-proprietors of the money with which it was purchased and paid for.

Benedict demanded a partition of that property; he had no right or capacity to demand any thing more, since his claim was limited to two undivided sevenths of that property as the vendee of two of the co-proprietors who had attained their majority, and were *sui juris*. The rights of the minors to five undivided sevenths of that property were not questioned, nor in any way controverted; and the only controversy was on the conflicting claims of Benedict, plaintiff in that suit, and Mrs. Fitzpatrick, one of the defendants.

The jurisdiction of the Second District Court is exclusively probate. Constitution, article 83; and it has no power to entertain a question of title to real estate claimed by majors alone.

The property never belonged to the succession of Patrick McGuigin. It belonged to Paul Cook when Patrick McGuigin died; and it was purchased of Cook, in the names of the minors, who were his children and heirs, with money in the hands of their tutor, as an investment for them. Two of the children, who were minors at the time of the purchase, had attained their majority, and had disposed of their respective shares and interests in this property; so that it was no longer the property of minors alone; and it was not the partition of succession property, nor the partition of the property of minors alone, that Benedict demanded or had the right to demand.

The partition of property which belongs in part to minors and in part to majors does not fall within the probate jurisdiction. It is not a probate case; it is an ordinary civil suit, between the co-proprietors, the object of which is to allot to each one of them his share and portion; and it belongs to the ordinary civil jurisdiction of the district courts. See Sevier vs. Gordon, 29 An. 440; Soye vs. Price, 30 An. 93; Woolfolk vs. Woolfolk, 30 An. 140; Boutté vs. Executors, 30 An. 182; Succession of Bayly, 30 An. 1032.

Mrs. Fitzpatrick excepted to Benedict's petition, that she was in possession under her title; and that the validity of her title could not be inquired into otherwise than by a petitory action. This exception was overruled, "reserving to her the right to plead the same on the merits." A default was taken against her; and she answered, "reserving the benefits of her exception already filed, renewing the same for the purposes of this answer, to the petition of W. S. Benedict so far as it relates to George McGuigin, pleads the general issue."

This plea went to the jurisdiction of the court, *ratione materiæ*. The question involved was purely one of title between two majors,

claiming under one and the same major; and this question the Second District Court had no power or authority to entertain or pass upon. The court should have dismissed the suit on this exception; and when the case came up for final trial, the only issues were those made by the petition of Benedict, the exception renewed in the answer of Mrs. Fitzpatrick, and the general issue pleaded by her. Instead of determining the question of title between Benedict and Mrs. Fitzpatrick, her plea and exception should have been maintained, and the suit dismissed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the suit of W. S. Benedict be dismissed for want of jurisdiction, and without prejudice to the right and title asserted by him, or to those set up and asserted by Mrs. Fitzpatrick, and that W. S. Benedict pay all the costs of this proceeding in this court and in the district court.

No. 7151.

THE STATE VS. WILLIAM HARRIS.

No appeal can be taken in a criminal case after the expiration of the term of court during which the sentence in the case was rendered.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Duffel*, J.

F. B. Earhart, District Attorney, for the State.

James D. Augustin for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. The defendant was convicted of rape, without capital punishment, and sentenced to hard labor for life.

The trial, conviction, and sentence was had at the April term, 1878, of the district court for parish of St. Charles. We take judicial cognizance of the fact that by act No. 41 of 1878 the April term of that court could not have extended beyond the thirteenth of April. A certified extract from the minutes shows also that the court adjourned *sine die* April 12, 1878. The appeal was applied for on the twentieth of April, 1878, and granted by the parish judge, acting in absence of the district judge from the parish, on the same day.

The State moves to dismiss the appeal, on the ground that the law requires appeals in criminal cases to be taken "during the term at which the sentence shall have been rendered," and "that no appeal shall be granted in such cases after the time specified shall have elapsed."

Act No. 30, approved February 19, 1878. The law is peremptory, and the appeal having been taken after the time prescribed by law must be dismissed. There is no force in the defendant's proposition that the word "term" means a time covering the aggregate sessions of the court in all the parishes of the district.

The motion to dismiss is sustained.

Rehearing refused.

No. 7075.

JAMES BUCKLEY vs. WM. H. SEYMOUR.

A state of facts brought to the attention of the court which would justify and require a new trial after judgment will justify the re-opening and re-assignment of the case before judgment.

One who is publicly acting as the deputy of a notary, and whose oath of office has been administered by the notary himself, is qualified to make demand of payment and perform the other functions of a deputy notary.

Only legal interest will be allowed when a larger interest is not stipulated in writing.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Sam. P. Blanc for plaintiff and appellee.

A. J. Lewis for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. J. A. Gresham executed his note to plaintiff, with W. H. Seymour as indorser, for $4125.

Plaintiff alleges that after various partial payments thereon by Gresham, there remained due thereon at its maturity $1507 20, which not being paid on due demand, said note was protested, and the indorser duly notified. He therefore brings this suit against the indorser.

The defendant answered by a general denial, and the averment that Gresham had made payments to an amount which reduced the balance due to $957 20; that there was never any legal demand of payment, protest, or notice of protest, of said note. By supplemental answer he alleged in general terms that Gresham had made other and further payments on said note, and that there was but little if any thing due thereon.

After considerable testimony had been taken on the subject of payments, the court on objection of plaintiff's counsel to proof by defendant of any other defense than that of payment, permitted and required defendant to elect between the plea of payment and that of want of demand, protest, and motion, on the ground that they were inconsistent. The defendant elected the latter plea. He complains of this ruling, but

reserved no bill of exceptions to this refusal of the judge to hear further evidence on the plea of payment. We need not therefore notice the matter further.

The note was protested on thirty-first July, 1876, and notice of protest served on the next day, first of August; but by clerical error the notary certifies that the notice was served on thirty-first August instead of first August. He and his deputy were called to explain, and did explain, this error. Defendant objected to the proof. It is unnecessary to pass upon the objection, since the whole theory of the defense proceeds upon the assumption that the notice was given or attempted to be given on first August. The theory, as we shall see hereafter, is that the notary on first August left the notice for Seymour in the wrong office, to wit, Shannon's, and that one Dunham, by mistake, inclosed it in his *letter of that date* to Shannon in New York.

After the case had been submitted to the court, but before any decision thereon, the plaintiff made application to have the case re-opened, and re-assigned for trial, on the ground that he had since the trial discovered new and important testimony, etc. This application was accompanied by the usual affidavits, of diligence, discovery, materiality, together with detail of facts expected to be proved, etc. The court granted the application, re-opened the case, and re-assigned it for trial on ——— day of ———.

The judge states as reason, that the facts disclosed would have been good ground for new trial, and that therefore he re-opened and re-assigned the cause. We see no error in this. A state of facts which would justify and require a new trial after judgment certainly justifies the re-opening and re-assignment of the case before judgment. The law does not require courts to do vain things—to go on and render judgments which it is manifest they would immediately have to set aside.

The merits of this controversy are narrowed down to two questions—

First—As to the legality of the demand of payment, and therefore of the protest;

Second—As to whether there was in fact a good service of notice of protest on Seymour.

The first question grows entirely out of the fact that the deputy notary, Barry, who demanded payment of the note, was sworn as such by Cohn, the notary, and not by a judge or justice of the peace. It is further urged that Barry was appointed by Cohn as deputy, and by him sworn as such, on sixth January, 1868, and that the offices of both Cohn and Barry, *ex necessitate*, were vacated by the going into operation of the new constitution in April, 1868. Arts. 150, 153, and 158 of that constitution are cited as authority for this proposition. We do not

think they support it. It is stated as a fact by defendant that Cohn was re-appointed and qualified anew as notary under the constitution of 1868, but that Barry did not. We think it matter of no moment whether he ought to have done so or not, or whether he did so or not. Notaries and their deputies are officers recognized by law. R. S. 2491 to 2527. Notaries were in 1868 authorized to administer oaths, "*quoad* the duties of their office," R. S. 2493, and to appoint deputies. R. S. 2527.

Whether the notary Cohn had authority to administer the oath to his deputy or not is unimportant so far as third persons and the public are concerned. Barry was in the actual and open exercise of the duties of the office of deputy notary, and the public is not to be expected or required to institute investigations into the regularity and legality of the mode of his qualification. Such a requirement would be absurd in the last degree. The same rule would require every person filing a suit in court to investigate the question as to whether the deputy clerk or deputy sheriff actually discharging duties as such was or was not duly sworn as such. In conclusion, it is enough to say that Barry was an acting deputy notary, under color of authority, and so far as third persons are concerned this suffices to legalize his acts. The demand of payment and protest were therefore legal.

The only remaining question is one of fact. Mr. Cohn, the notary, certifies that on (31st) first August, 1876, he gave notice of protest to Seymour, by leaving the same "on his desk in his office, he not being in." Cohn states as a witness "*positively*" that he served the notice as stated, "early in the morning of the first August." It is not denied that he is a correct and truthful man. But the defendant contends that by mistake Cohn left the notice on Shannon's desk in an adjoining office; that by mistake one Dunham put this notice into a letter by him written that day to Shannon in New York. The testimony of Dunham and Shannon was taken, and it may be said to establish the fact that Dunham did send the notice to Shannon, and that it did not return to New Orleans until seventeenth August. But we do not think this shows the statement of Cohn to be false. Both might be true; for after Cohn left it on Seymour's desk it might have been taken into Shannon's office by some other person.

Many witnesses were sworn with purpose of showing that Cohn did not come into Seymour's office on first August, 1876. This testimony was taken in May and June, 1877, and all the witnesses state that they had never been talked to on the subject. The witnesses who are emphatic and positive that Cohn did not come into Seymour's office that day are Seymour, the defendant, and Killaly, his copying-clerk. These witnesses both swear positively that they were in the office the whole time from 9 A. M. to 4 P. M. of that day, and that it

was impossible that Cohn could have come in and they not have seen him. But when we come to compare the testimony of these witnesses they are utterly irreconcilable. As we have stated, Seymour states that he was in the office all day, passing acts and helping Killaly make up his indexes, etc.; that he knew he was there all day without going out, only by reference to the amount of work he did in the office that day; that is his means of knowing, etc. Now Killaly swore that he came to the office that morning at nine o'clock, and produces a memorandum to that effect; that he found the office door open, and presumes it was opened by the colored man who attended the office. He swears that defendant Seymour *was not in the office that day!* Now Seymour swears he was there all day, and helping Killaly. Being asked if any person or persons came in during the day, Killaly said plenty of them, but could not name a single man, but he could swear Cohn did not come. In some respects this witness's memory was remarkably minute—descending into minutes in point of time, and to trifles in other matters. The judge *a quo* heard all this testimony and he did not consider it as disproving the truth of Cohn's statement. Neither do we. Perhaps it was before 9 A. M. that Cohn left the notice, for he says it was early in the morning, and perhaps this accounts for the office being open when Killaly reached it. Mr. Cohn, who had officially and contemporaneously certified, swears positively to doing a certain thing on a certain day, more than a year before. Seymour and Killaly swear that they were in the office all day and did not see him do it. We have no great confidence in the accuracy of a man's statement who undertakes to swear where he was every minute of a certain day, a year ago, where it is not pretended he was engaged otherwise than in the ordinary routine of his daily business. It is manifest that Killaly's memory is very bad, indeed, for he swears that Seymour was absent from his office all day, whereas Seymour swears that he was in the office all day from nine to four o'clock, and produces notarial acts passed by him at his office on that day.

Cohn may have deposited the notice before Seymour or Killaly reached the office. He certified officially at the time that he had so deposited the notice and confirmed the truth of his certificate by his positive oath to same effect. Defendant has not disproved by satisfactory evidence the truth of Cohn's statement. We attach but little importance to Dunham having sent the notice on to New York by mistake, as he swears; and we may add that we give but little credit to his evidence. This record teems with facts and circumstances going to show that he was either a remarkably unfortunate man, or else a man who was not unfamiliar with "ways that are dark." It is unnecessary to detail these facts and circumstances; suffice it to say that, like the district judge, we prefer to believe Mr. Cohn.

We think, however, that the judgment is for too much by $25, and improperly allows eight per cent interest. The note stipulating no interest, it only draws five per cent from maturity. Plaintiff himself states that he received $2500 in money, and was to allow five per cent bonus thereon, making $2625, and that subsequently he received $17 80 more. This reduces the debt to $1482 20, instead of $1507 20, as allowed below.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount thereof from $1507 20 to fourteen hundred and eighty-two 20-100 dollars, and by reducing the rate of interest thereon from eight to five per cent, and that as thus amended said judgment be affirmed at costs of defendant in the court below, and at plaintiff's costs in this court.

No. 6791.

A. M. AGELASTO vs. W. R. MILLS. RIGHTOR ET AL., SURETIES.

Where an appellee, on the ground of the insolvency of the sureties on the appeal bond, has procured a judgment of the district court setting aside the appeal, (which has been filed in this court and not afterwards dismissed,) he can not subsequently pursue the sureties in virtue of a judgment rendered in the case by this court.

APPEAL from the Sixth District Court, parish of Orleans. *Tissot*, J., presiding in place of *Rightor*, J., recused.

Robert G. Dugué for plaintiff and appellant.

Lyman Harding and *J. Livingston* for defendants and appellees.

The opinion of the court was delivered by

MARR, J. William R. Mills obtained an order for a suspensive appeal from an order of seizure and sale; and he gave the usual bond, in the sum of $9000, with N. H. Rightor as surety for $4000, and D. W. Eames and Joshua G. Baker as sureties, each for $2500. Plaintiff moved to set aside the appeal, on the ground that the sureties were insufficient. Pending this motion, on the 4th May, 1874, the transcript was filed in this court, and on the 4th June the district court dismissed the appeal. Mills applied for a prohibition to prevent the execution of the writ of seizure and sale. The usual rule *nisi* was granted; but it seems not to have been passed upon. The appeal was heard and determined; and a final decree was rendered by this court on the 30th November, 1874, affirming the order of seizure and sale.

After the decree of affirmance was rendered the sheriff re-advertised the mortgaged property; and on the 6th of February, 1875, part of it, two lots and the buildings and improvements in the Sixth District, was sold for $2000, cash, of which $614 43 were applied to a prior mortgage,

$479 78 to the costs, and $895 55 to taxes due, aggregating the sum of $1989 76, and leaving $10 24 to be applied to the mortgage debt, which amounted, up to the day of sale, to $6077 24. The other property mortgaged, a lot with buildings and improvements in the Second District, was not sold, for want of bidders. On the 27th February this property was offered on twelve-months credit, and was not sold, for want of bidders, on account of the prior mortgages exceeding its value; and the writ was returned by order of plaintiff's attorney on the 24th of August, 1876.

A rule was then taken on the sureties in the appeal bond, to make them liable for the balance of the mortgage debt, $6067. The sureties answered that they were not liable, because the order granting the appeal had been rescinded, the bond avoided, and the sureties discharged; that the order of seizure and sale had been satisfied by the sale of the mortgaged property; and that there was no personal judgment against Mills.

The district court discharged the rule on the ground that where the appeal was set aside because of the insolvency of the sureties there was no longer an appeal bond, there were no sureties, there was no appeal; and that the judgment setting aside the appeal and releasing the sureties stands unreversed and is forever final.

If it had been properly brought to the notice of this court that the order of appeal had been set aside by the district court because of the insolvency of the sureties, no doubt the appeal would have been dismissed. If the appellee had directed the attention of the court to the fact that he was arrested by the application for a writ of prohibition in the exercise of his right to enforce the order of seizure and sale, after the order of appeal had been set aside, no doubt the court would have passed upon the application, and would have dismissed it, and refused to hear the appeal, if the district court correctly decided that the bond was insufficient.

We are not prepared to say that if the appellee fails to have the appeal dismissed in this court, after the order of appeal has been set aside in the district court, and permits the further action of the district court to be suspended by the application for a prohibition, the jurisdiction of this court would be divested, and that its final action and decree on the appeal would be a nullity. The appeal bond is for the benefit of the appellee; and if he fails to bring to the notice of the court the fact that he is not secured by such a bond as he has the right to require, it does not follow that the court may not validly pass upon the appeal on the merits.

But it is clear that if the appellee procure the judgment of the district court setting aside the appeal for want of a sufficient bond, he has

no claim on the sureties, whom he has thus formally refused to accept. It is obvious that the right of the plaintiff to proceed, after the district court has set aside the order of appeal for insolvency of the sureties, is no longer suspended by the appeal; and if he is delayed until the final hearing of the appeal, it must be because of some other act on the part of the appellant, or some omission on the part of the appellee, for which the rejected and released sureties in the appeal bond are not answerable.

The judgment appealed from is, therefore, affirmed with costs.

Rehearing refused.

No. 7125.

LAFAYETTE FIRE INSURANCE COMPANY VS. H. E. REMMERS.

A bill of exceptions need not be taken to the rulings of the court in civil suits. It is only necessary to note the exceptions in the note of evidence.

A party objecting to evidence offered in the court below must see that the objections are stated in the note of evidence; otherwise this court will not consider them.

The surety on an appeal bond has the right to show in his defense that a legal sale of the principal's property would have satisfied the plaintiff's writ, or that the fraud of the plaintiff prevented its satisfaction.

Where in an application for a rehearing no time is asked in which to file a printed statement of the applicant's points and authorities, and none has been filed, the rehearing will be refused.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Hornor & Benedict for plaintiff and appellee.

Kramer & Dalton for defendant and appellant.

The opinion of the court on the original hearing was delivered by SPENCER, J., and on the application for a rehearing by MANNING, C. J.

SPENCER, J. The plaintiff obtained final judgment in this court against Remmers on a mortgage note for $2800, interest, costs, and attorneys' fees. See 29 An. Webert was surety on the appeal bond in that case.

Pending that suit, the defendant, Remmers, brought suit in the Fifth District Court of Orleans to recover of plaintiff $3500, amount of a fire policy on property which had been burned, said suit being styled Remmers vs. Lafayette Fire Insurance Company.

Soon after obtaining its judgment against Remmers, the Insurance Company issued execution, seized the mortgaged property, and also the claim and suit of Remmers against itself, then pending as aforesaid. The real estate was bought in at first offering by the Company for $1070, which, after deducting costs, taxes, fees, etc., left a net credit of $378 43 on the suit. The claim and suit of Remmers vs. the Company failing to

bring two thirds its appraisement was re-advertised for sale at twelve months. The sheriff returns that at this second offering this claim and suit were adjudicated to W. S. Benedict for one Joseph Mathis for $100, which sum less certain costs was also credited on the writ, which was thereupon returned unsatisfied. Thereupon the present rule was taken against Webert, the surety, to make him liable for the balance of the judgment against Remmers.

Webert answered the rule by alleging in substance that at said second sale said suit and claim were adjudicated to him (Webert) for $3050, more than enough to satisfy the writ; that by consent of the sheriff he stepped out of the auction-room for a few minutes to get the surety on the twelve-months bond, offering and tendering to the sheriff before leaving $3050 in money as a guarantee for his return with his surety to sign the bond; that the sheriff said he would wait his return, and had made no demand on him or tendered the bond for signature; that on his return, in about ten minutes, to his amazement he was told that the property had been re-offered, and adjudicated to the agent of the Insurance Company for $100, although said agent had just a few minutes before bid on it to the amount of $3025. He alleges conspiracy between the sheriff and plaintiff, and avers "that by this fraud, perpetrated by plaintiffs on this appearer, through the instrumentality of the sheriff, this appearer has been defrauded out of property adjudicated to him, and of the value of $3500, for which he was entitled to a credit of twelve months, and but for said fraud, combination, and conspiracy between the plaintiffs and the sheriff the defendant in execution would have been entitled to a credit of $3050 on said judgment."

The rule came on for trial, and the following is the note of evidence:

"Plaintiff offers in evidence the judgment in this case, No. 7315, also the decree of the Supreme Court ordering the execution thereof.

"Also the motion of appeal and bond of appeal.

"Also the writ of *fi. fa.* and sheriff's return.

"Defendant offers the witness now on the stand to prove the allegations of his answers.

"Objected to by plaintiff.

"Objection sustained by the court.

"Exceptions reserved by defendant.

"Rule submitted."

There was judgment against the surety for the balance of the judgment, $2697 67, with interest and costs.

The surety appeals, and claims that the court *a qua* improperly rejected evidence to sustain the allegations of his answer.

Plaintiff contends that as the defendant in rule took no "bill of exceptions," and that as the note of evidence does not set out the

grounds of plaintiff's objections, and as there is no assignment of errors, this court can not consider or determine the question whether the evidence was properly or improperly rejected; and finally that "it does not appear from this note of evidence, nor is it a fact, that there was any witness on the stand."

This last proposition is certainly advanced in the very teeth of the record, which declares that he "offers the witness *now* on the stand to prove," etc.

As to the bill of exceptions, the law (Act No. 102, 1877,) does not require one to be taken, but authorizes the exception to be stated in the note of evidence.

We think it was the duty of the plaintiff, making objections to defendant's evidence, to state them, and see that they were properly noted. He knew better than any one else what were his objections, and if he did not state them we can not presume what they were or supply them in a case where the record purports to contain a note of the evidence. Perhaps he assigned no grounds of objection, and if so neither the clerk nor defendant is responsible for the record not showing any. If what the defendant in the rule alleged and offered to prove be true, it is manifest that the sale of the property of Remmers realized more than enough to satisfy plaintiff's writ, and that this proceeding against the surety is wrongful and illegal. We are at a loss to conceive upon what grounds he was debarred from the right to prove the facts alleged. He certainly had the right to show either that plaintiff's writ was satisfied, or that a legal sale of the principal's property would have satisfied it, or that the fraud of the plaintiff prevented its satisfaction. Any one of these facts was good cause why judgment should not be rendered against him in this proceeding.

If what he charges be true, flagrant injustice has been done him and his principal, and we are not disposed, upon what is to say the most of it a doubtful technicality, to cut him off from relief.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that this case be remanded to be proceeded with according to law, appellee paying costs of this appeal.

ON APPLICATION FOR REHEARING.

MANNING, C. J. The application for a rehearing of this cause was filed in time, and with it a statement in manuscript of the reasons upon which the application is founded. No time was asked in which to file a printed statement of the points and authorities on which the applicant relies, and none has been filed. Rule IX makes this imperative: For want thereof,

The rehearing is refused.

No. 7213.

STATE EX REL. J. P. BECKER VS. JUDGE SIXTH DISTRICT COURT.

No district court of the parish of Orleans has authority to issue a writ of injunction to restrain the execution of a judgment rendered by any other district court of that parish. The court which renders the judgment can alone enjoin its execution.

APPLICATION for writs of mandamus and prohibition.

W. E. Murphy for relator.

Simeon Belden for respondent.

The opinion of the court was delivered by

SPENCER, J. Relator, Becker, having obtained judgment in the Third District Court of Orleans against William Winkleman, issued execution thereon.

Frederick H. Quick, alleging that Becker was about to cause the seizure of certain premises belonging to him, obtained in the Sixth District Court of Orleans an injunction restraining the execution of said writ. Relator asks that said court be prohibited from proceeding in said cause.

The only question necessary for us to decide is, whether the Sixth District Court had jurisdiction and authority to issue said injunction against the process of the Third District Court:

Act No. 86 of 1870 provides, section one—"That whenever a suit or judicial proceeding is instituted in any of the courts of the parish of Orleans where such court has jurisdiction, all parties to such suits shall be confined *exclusively* to such court for the trial of all issues or matters that may arise in the course of such litigation, or out of the judgment rendered in such litigation; and no *other* judge shall have jurisdiction to grant orders of injunction, sequestration, or any other order by which the proceeding in such litigation or judgment rendered therein, or property in litigation shall be stayed or in any manner interfered with or interrupted; nor shall any *other* judge grant any of the above orders *in favor of any party not a party to such litigation or judgment*, claiming to have an interest therein or to be affected thereby; but all such orders shall be granted by the judge before whom the original suit or judicial proceedings were instituted."

The second section makes it the duty of the judge who may have granted such order, in contravention of this act, to immediately (on having the fact brought to his knowledge, *ex parte* or otherwise) revoke and rescind such orders, either in chambers or open court, and to cause the officer in charge of the execution of such writ to be notified of such revocation, and to return the same at once, etc. It denounces severe penalties for disregarding its provisions.

We see no reason to doubt that the proceedings in the Sixth District Court were taken in violation of this mandatory and punitory statute, and are illegal and void.

It is therefore ordered that the provisional writ of prohibition heretofore issued be made peremptory, and that defendants pay costs of this proceeding.

No. 6863.

JAMES G. CLARK VS. THE BOARD OF HEALTH ET AL.

The act No. 37 of the extra session of the Legislature of 1877, regulating the sale of coal oil, petroleum, etc., prescribing penalties for the infraction of the act, and delegating to the Board of Health the authority to enforce the law, does not violate article 114 or article 118 of the constitution of the State; or that provision of the constitution of the United States giving to Congress the power to regulate commerce between the States; or that provision forbidding any State to lay any impost or export duty except what may be necessary to the execution of its inspection laws. Act No. 37 is an inspection law.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

McGloin & Nixon for plaintiffs and appellants.

Kennedy & Austin for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Appellants, plaintiffs, dealers in coal oil, in the city of New Orleans, brought this suit to have declared unconstitutional and void an act of the Legislature, No. 37, of the extra session of 1877, p. 60, entitled "An act to provide for the gauging and inspecting coal oils, or fluids derived wholly or in part from coal or petroleum; to regulate the sale or disposition of the same; to prohibit, in certain cases, the sale or disposition of illuminating oils or fluids dangerous to life and property, and to prescribe penalties for violations of this act."

They also sought to obtain an injunction forbidding the Board of Health to collect fees, as provided for in the act, and to execute it otherwise, on the ground that its provisions are in conflict with both the Federal and State constitutions.

Appellees, defendants, excepted that the petition disclosed no cause of action; and they also answered by pleading the general issue. On rule *nisi*, the district court refused to grant the preliminary injunction; and, on trial on the merits, there was judgment in favor of defendants against plaintiffs, from which plaintiffs appealed.

There are no issues of fact involved. The plaintiffs object that the act in question violates articles 114 and 118 of the State constitution;

and article 1, section 8, clause 3, and section 10, clause 2, of the constitution of the United States. We shall consider these objections in their order.

First—Article 114 of the constitution of the State provides that "every law shall express its object or objects in the title." The first and second sections of the act authorize the State Board of Health, in the parish of Orleans, and the mayors and councils of the towns and cities in other parishes, of not less than 2000 inhabitants, to appoint gaugers and inspectors of coal oils and all illuminating fluids or oils derived wholly or in part from coal or petroleum, and of all fluids commonly known in commerce as naphtha, deodorized naphtha, or gasoline, or benzine; the gaugers and inspectors to be sworn, and to give bond for the faithful performance of their duties; and to receive such salaries as may be fixed by the Board of Health, or the mayors and councils by which they are respectively appointed.

The third and fourth sections prescribe the duties of these gaugers and inspectors. The fourth section provides that they shall give proper certificates to those requiring such gauging and inspection, duplicates to be furnished to the Board of Health, and it authorizes the Board of Health in New Orleans to collect a fee of a quarter of a cent a gallon, for gauging and inspecting oils not in barrels, and twelve and a half cents per barrel, including the replacing of the bung.

The fifth section imposes a penalty for selling or exposing for sale coal oil or illuminating oil or fluid, as described in the first section, not gauged and inspected. The sixth section prescribes the penalty for selling or exposing for sale, or giving or delivering such coal oils or illuminating fluids the flashing point of which is less than 125 degrees of Fahrenheit, unless the package be stamped conspicuously, "explosive and dangerous:" and the seventh section prescribes the penalty for selling or giving or delivering any such illuminating oils or fluids which have not been inspected, gauged, and stamped.

The eighth section makes it the duty of the Board of Health in New Orleans, and of the district attorneys in the country parishes, to sue for the penalties incurred by violation of the act; and provides for the disposition to be made of the fines recovered, to be paid to the Board of Health in New Orleans, and to the Charity Hospitals at Shreveport and Baton Rouge.

The ninth section, the more effectually to carry out the provisions of the act, authorizes the district attorneys in the country parishes, and the Board of Health in New Orleans, at the time of bringing suit, or subsequently, without bond, to obtain a writ of injunction forbidding the defendant in such suit to do or suffer to be done any of the acts on account of which such suit was brought: and the tenth section fixes

the date at which the act shall take effect; and repeals all conflicting or inconsistent laws.

If there is any part of this act which is not strictly germain to and included in the objects expressed in the title, we confess our total inability to perceive it: nor can we discover in it any violation of act 114 of the constitution.

Second—Article 118 of the constitution provides that "taxation shall be equal and uniform throughout the State;" it also forbids specific taxation; and it requires that all property shall be taxed *ad valorem*.

There is nothing in this act that can be supposed to be in violation of this article of the constitution except the fee of a quarter of a cent per gallon, or twelve and a half cents per barrel, which section 4 authorizes the Board of Health in New Orleans to collect.

As early as 1805 an act of the Legislature was passed, regulating the inspection of flour, beef, and pork, fixing the weight of the barrel, the fees for inspection, and penalties for violation of the provisions of the act. In 1816, an act was passed regulating the inspection of tobacco in hogsheads and casks, fixing the fees for inspection, and prescribing penalties, etc. Hay also was made subject to inspection; and so were weights and measures. These laws have been revised, and re-enacted; and they are local regulations; they are now in force. Similar laws exist in all the States; and yet, it is a fundamental principle in all well-organized governments, that taxation must be uniform and equal; and this principle derives no additional force by the mere formulation of it in written constitutions.

Inspection laws are a necessity. They have for their object the protection of buyers and consumers against fraud in weights and measures; and of life and property against the risks of exposing for sale and selling, without proper notice and warning, dangerous commodities, and such articles of food as are unfit for use, or, from their condition, would be injurious to health.

It is admitted, indeed it can not be questioned, that as inspection laws are necessary, it is also necessary to compensate the persons charged with the important duties required of inspectors. The specific objections to the act in question are that the fees fixed by section 3 are applicable to dealers in New Orleans alone; and are, therefore, partial; and that they are not paid to the inspectors as compensation for their services, but to the Board of Health; and it is urged that this feature makes them a tax.

With respect to this first objection, it is a sufficient answer to say that inspection laws are local. They are specially required at the great marts; and in a crowded city like New Orleans, where immense quantities of the explosive and dangerous illuminating fluids specified in the

first section of the act are in the hands of the numerous dealers, and are used in so many houses, and by so many of the inhabitants; where liability to explosions is so greatly increased; and where the consequences would be so much more destructive of life and property than in a small village, or in a single isolated house, there is so much the greater necessity for careful inspection, and for putting conspicuously on the packages in which these fluids are contained marks indicating plainly to dealers and consumers the degree of caution which is necessary to be observed in handling and using them.

In the country parishes, the Legislature deemed it sufficient to authorize the mayors and councils to appoint and to fix the salaries of the gaugers and inspectors; but it also deemed it necessary, in the city of New Orleans, to intrust this entire business to the Board of Health, composed, in part, at least, of scientific men, capable of ascertaining the qualifications of the gaugers and inspectors appointed by them, and of seeing that the important duties required of these functionaries are faithfully performed. The Board of Health fixes and pays the salaries; and obtains the means to pay them by collecting the fees provided in the act.

All such legislation falls within the police power of the State; and the State has chosen, in view of the grave interests involved, to delegate to the Board of Health the authority and the duty to see that the law is enforced. There can be no reason why the State should not thus provide for the execution of this branch of the police power, as validly as it might have contented itself with providing for the appointment of the inspectors by the Governor, or otherwise, and have fixed their fees. It was not unwise to require the Board to take upon itself this inspection, and to make the inspectors dependent upon and responsible to the Board.

We do not perceive in what respect the public interest suffers any detriment by the special provisions applicable to the city of New Orleans alone; nor do we think that this feature in the act, or any other of its provisions, violates article 118 of the constitution.

Third—Clause 3, section 8, article 1, of the constitution of the United States declares that the Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Under this clause foreign nations and the several States of the Union have the right to send to our market the products of the soil, and the results of their skill and labor, subject to such regulations and restrictions as the Congress may impose. The State can not interpose any obstacle to this traffic, commerce; but the State can protect the health, the lives, and the property of its inhabitants against false weights and false measures: against the improper exposure and sale of articles dangerous to life and to property, or injurious to

health by their unsound condition and unfitness for food for man or beast. Such regulations do not fall within the terms and meaning of this clause of the constitution; they belong, not to the Congress, but to the police power of the State; and the Congress can not interfere with the proper exercise of this power. The inhabitants of other States and foreign countries may send their hay, flour, beef, pork, tobacco, illuminating oils, to our market for sale, and no power in the State can prevent it; but the State can and it is bound to subject all such articles to such inspection as will protect buyers and consumers from fraud, health from injury, and life and property from destruction.

Fourth—Clause 2, section 10, article 1, declares that "no State shall without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for the execution of its inspection laws, * * * and all such laws shall be subject to the revision and control of the Congress."

It is clear that the act of 1877 is an inspection law. Not a dollar of the fees goes into the State treasury; and whether these fees are in excess of what would be absolutely necessary or not, they are not a tax. They are the means provided to be used and expended by the Board of Health in the execution of the law. It is not alleged, nor is it proven, that the fees allowed are not absolutely necessary for executing the law; and the presumption is that, having the power to the extent of the necessity, the Legislature has not exceeded that power. But if this allegation were made, the serious question would arise whether it would be cognizable in a judicial tribunal.

Unquestionably, there are some of the prohibitions in restriction of State power in section 10 of article 1 of the constitution which must be enforced by the judicial power; perhaps all those contained in the first clause of this section; but with respect to the State laws which clause 2 recognizes and does not prohibit, within certain limitations they seem to be subjected to one tribunal only—"to the revision and control of the Congress."

It is not necessary, however, to pass upon this question. It suffices to say that in this case there is no allegation, there is no proof, authorizing any inquiry as to the necessity of the amount fixed by the statute for the execution of the law; nor is there in the act itself any apparent violation of the constitution of the United States.

The act is wise and wholesome; and its rigid enforcement may prevent or diminish the number of the shocking accidents from the incautious use of illuminating oils and fluids with which the columns of the daily press teem.

The judgment appealed from is affirmed with costs.

Rehearing refused.

No. 7149.

THE LOUISIANA NATIONAL BANK VS. THE BOARD OF LIQUIDATION.

The mere fact that certain valid State warrants paid to the State as the purchase price of State bonds that had been issued to the free-school fund, (and which the State had no power to sell,) are in the treasury of the State, and not in the hands of their owner, is not a ground for a refusal by the Board of Liquidation to fund them.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

H. C. Miller for plaintiff and appellee.

H. N. Ogden, Attorney General, for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 5th of May, 1871, the Louisiana National Bank loaned the State—to assist it in stopping *crevasses*, the sum of $20,000, and—to pay that sum—an appropriation was made by the Legislature on the 5th of March 1872. Under that appropriation, and in settlement of said loan and the interest which had accrued on it, the Auditor gave to the bank his warrant for $21,751.10c. With that warrant and a small amount in cash, plaintiff liquidated the price of twenty nine bonds sold to it under act No. 81 of 1872, and which had been issued by the State, on the 1st of July 1857, to the free-school fund. These facts are tacitly admitted by defendant, and fully established by the evidence.

The Bank applied to the Board of liquidation to do one of two things—to either fund the twenty-nine bonds purchased by it, or to issue consols for the amount of the warrant representing the loan made to the State in 1871, and which was surrendered in part settlement of the price of said bonds.

This court having held that the sale of the school bonds is an absolute nullity—29 A. 77—the Board properly refused to accede to the first of the Bank's demands, but it should have granted the other. The loan was made to protect the State against the impending disasters of an overflow, and is—of this there can be no reasonable doubt—a valid and outstanding claim against it.

The only defence opposed to the alternative application of the Bank is that the Auditor's warrant surrendered as the price of the school bonds is in the public treasury, and can be taken therefrom but by direction of the Legislature. That defence is not tenable: the fact that the State is in possession of the evidence of one of its indisputable liabilities, is an additional reason why the as yet unsatisfied and already surrendered warrant should be funded. The State is justly entitled to the possession of the school bonds, but it could not justly keep the money loaned, the warrant delivered for that loan, the cake and the picayune.

In substance, the decree of the lower court is strictly correct: in form, it is not as complete as it should have been.

It is therefore ordered, adjudged and decreed that the judgment appealed from is amended, and the Board of liquidation ordered to fund the claim evidenced by warrant No. 2222, now deposited in the State Treasury, and drawn by the Auditor to the order of the Louisiana National Bank, on the 31st of May 1872.

It is further ordered, adjudged and decreed that, as amended, the judgment appealed from is affirmed with costs.

No. 7118.

JOHN MAGNER VS. THE HIBERNIA INSURANCE COMPANY.

A debtor whose property has been seized, sold and bought in by his mortgage creditor, can not subsequently acquire a tax title to the property, to the prejudice of the creditor, in virtue of a sale made by the tax collector, for taxes assessed in his name, and which had accrued on the property while he was the owner.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

John S. Tully for plaintiff and appellant.

Thos. Gilmore & Sons for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 12th of October 1874, defendant, then a mortgage creditor of plaintiff, purchased—at a sale made by the sheriff to satisfy its claim, the property described in that officer's deed, and—by said sale and purchase—defendant's claim was but partly extinguished.

On the 15th of March 1875, the Insurance Company took a rule on the sheriff to be placed in possession of the property purchased by it in October 1874. The rule was made absolute, and—long after—on the 16th of November 1877, a writ of possession issued from the decree rendered in the rule. On the 26th of that month, the execution of that writ was enjoined by John Magner, on the ground that—on the 1st of June 1876—he had acquired his creditor's property at a tax sale.

That property was seized and sold by the State Collector for the taxes thereon levied and due in 1874, before the company had bought it at the sheriff's sale. In the act which evidences the last-mentioned sale, there is a declaration that the adjudicatee has retained—to be applied to the payment of those very taxes—the sum of $139.55c.

How and from whom did the Tax-Collector seize the property? Was it from John Magner, who—though he continued in possession of the same—had then no title to it? Was it from the company, after the

formalities prescribed by law? On whom were the demands made, the notices served? We have found no evidence in the record relating to these facts, and two titles are before us: by both, it is the interest of John Magner which is transferred—: in 1874, to the Insurance Company—in 1876, to John Magner himself.

When, at that date—he purchased and took title to that property, he knew that it had—nearly twenty months before—been acquired by the Insurance Company, which then was and is now its creditor, and he—most probably—knew that—in April 1875, a rule to place said purchaser in possession had been made absolute.

It is true that—out of the price of adjudication of the 12th of October 1874, the Insurance Company had retained an amount corresponding to that of the State taxes of that year, and which outranked its mortgage; but it is also true that Magner was primarily liable for those taxes, and he could not—by the payment of his own, his acknowledged debt—evict his creditor and divest his title; nor can he successfully urge that — howsoever and under whatever circumstances it may have been made—the payment of such a claim by him, the debtor thereof, and of not a cent more than that claim, against the enforcement of which he was morally and legally bound to protect his creditor and his creditor's property, could, can or did—as between them, constitute—in fact or in law—the payment of a price and the consideration of a forced sale of his creditor's property, made for no other purpose than to satisfy a prior legal claim due to the State by the purchaser at that sale. He had the money to pay the taxes: he could have paid them before, as he did immediately after the sale: but he could certainly not—taking advantage of his own wrong, his own fault—acquire his creditor's property, seized and sold for his own debt, and do this without paying a single dollar over and above the amount for which he—the debtor—was liable before the adjudication from the Collector to him, before a sale which he had the means, and which it was his duty and obligation to prevent.

The deed from the Collector to Magner recites "that after having complied with all the legal requisites, the Collector seized and sold the property at public auction, and that John Magner being the last and highest bidder, it was adjudicated to him for the price of sixty-two dollars and forty-three cents." What, according to the terms of the deed, was thus adjudicated? The right, title, and interest of John Magner in and to said property. At the date of that sale, and so far as disclosed by the record, he had no right, title or interest, in, on or to the same. He purchased, in 1876, what—to his knowledge—he had been divested of in 1874, by the foreclosure of a mortgage granted by himself, by the enforcement of his own obligation.

The taxes for which the property was seized and sold by the Collector were due by John Magner before the sale from the sheriff to the Insurance Company, and at the date of the sale from the Collector to Magner. They were so due by him—if not to the State—to said company. As lately held by this court, the payment of the price of a sale made under such circumstances is but the payment of a claim for which the purchaser was liable before the sale; and he could not—by failure to comply with his obligation, by retaining the money with which he could have satisfied it—compel the enforcement of his own obligation, and derive, through that enforcement, by merely bidding and paying the amount of the tax due by him, a valid title to his creditor's property.

30 A. *ante.*

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

Rehearing refused.

No. 7005.

E. E. MAILHOT vs. ROBERT PUGH.

The owner of a plantation is not liable for damages to an adjoining plantation caused by works erected on his own plantation, in order to prevent its inundation by a destructive overflow of the Mississippi river; more especially when the owner of the adjoining place refused to co-operate in a common work for the protection of both places.

One can not claim indemnity for damages which he has contributed to bring about by his own negligence, or culpable indolence.

APPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Whittington*, judge *ad hoc.*

Walter Guion and *Wm. Reed Mills* for plaintiff and appellant.

E. D. White and *L. W. Folse* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The parties to this suit are owners of adjoining plantations on the right bank of Bayou Lafourche in the parish of Assumption. The plaintiff's demand is for eight thousand dollars as compensation for damages caused, as he alleges, by the acts of the defendant which occasioned the destruction of his crops in 1874.

The waters of the Mississippi river rose high in that year. There were several crevasses, and consequent inundations. These two plantations were endangered by the back water, which from the confirmation of that part of the country, was sure to flow in upon them from the rear, and this necessitated the construction of works for their protection.

The cause of action partly rests upon an alleged contract between the owners of the two plantations to keep up a common line of defence against back water, and upon the existence of a ditch, alleged to be common to both properties, through which some of the crevasse water passed, and in which was a temporary obstruction, placed there by defendant and by him subsequently removed.

Both of these failed to be substantiated on the trial. There was no proof of any contract between the present owners for a common system of defence, and none to establish a pre-existing contract which would amount to, or would entail, a servitude upon the lands. The ditch is there, but so far from being common, it is entirely on the defendant's land.

The action resolves itself into a claim for damages for loss occasioned by works erected by the defendant upon his own land to protect it from an alarming accession of water, and from what proved to be an extraordinary inundation. It is matter of public history that the overflow of 1874 carried ruin and devastation to an unusually extensive area of country, spreading especially over the alluvial basin between the Atchafalaya and Lafourche, and causing unprecedented destruction in the parish where the properties of these litigants are situated.

The pivotal inquiry then here is, is the defendant liable in damages for injury, caused by works erected on his own land to save it and the crops upon it from destruction, in an exceptional and pressing emergency.

The plan adopted by the defendant for the protection of his property, and the works erected in carrying it out, was intelligent and systematic. It was not hap-hazard. Nothing was done from mere transient impulse, or the suggestion of a moment, but the plan was conceived as a whole, and so perfected and executed. It also appears that defendant was both willing and anxious to have the co-operation of the plaintiff in maturing, adopting, and carrying out some system of defence, common to both, which each would assist in preparing, and which would equally protect both. Turjeon, the overseer at Mailhot's place, saw the necessity of a protecting levee being thrown up without delay, and the two proprietors had that matter under consideration. The judge who tried this case says in his written reasons for judgment;—"On the first of May three interviews between plaintiff and the defendant were had on the subject of building such protecting levee between their two places on the side of the canal towards Mailhot. Propositions between them were made at one time, an agreement accepted, then rejected, and eventually nothing was done towards building the projected levees.

"These several interviews, and the conversation which took place

thereat, and which is fully set forth by the testimony, will not lead me to believe other than that Mr. Mailhot was well aware of such a protecting levee as was spoken of and contemplated, being required as a means of defense to protect his plantation and cane from inundation by the crevasse water of the Mississippi, and to make it evident that Mr. Mailhot, at the time, could not have had any idea or belief that Mr. Pugh, by reason of his levee, dam or otherwise, intended to protect him, Mailhot, from inundation by crevasse water."

Further on, in relation to the same matter, the judge proceeds;—

"Plaintiff says it was impossible for him to put up a levee in time, because Pugh positively refused to enter into the agreement. From the testimony I do not understand that Mr. Pugh refused to enter into an agreement with Mailhot. On the contrary, defendant sought plaintiff, and expressed a desire to make an agreement with him for the erection of a proposed levee.

"Mr. Mailhot knew of the crevasses; knew that the water was coming; was aware that his levee was bad and weak, in fact in almost a worthless condition, and yet, after being advised by his overseer to build a stronger and more perfect levee on his side towards Pugh, to the building of which Pugh had consented and offered to assist him, he refused to do any thing; waits idly during the time. Turjeon says a levee sufficient to protect Mailhot could have been built, at a cost of about fifty dollars, and finally quietly subsides to the seepage and inundation, merely remarking to Mr. Pugh, "if I am inundated, I shall hold you responsible for what damage I may sustain."

The defendant, testifying, says his whole object was to protect a part of his crop from the imminent inundation, and that he was desirous of preventing any pretext for complaint, and therefore offered to assist the plaintiff in building a levee between certain designated points, provided a written agreement was made, exhibiting the stipulations and intentions of both parties, so as to prevent any misunderstanding, or pretense of legal obligation arising from effectuating those intentions. This was declined by plaintiff. Turjeon says that at one of the interviews between the plaintiff and the defendant, it was understood that the defendant was to work the pump, which working plaintiff alleges was one of the causes of his losses, and that the defendant also avowed his purpose to remove the dam, which subsequent removal was another cause of the inundation of plaintiff's land. This last statement was objected to, and a bill reserved to its rejection, which we think well taken, and not necessary to discuss.

An examination of the testimony satisfies us that the plaintiff had in his power his own protection, by a timely adhesion to the system of common defence promptly adopted by his more energetic neighbour,

which, if jointly executed with vigour, would have saved both from the devastating floods, which were sweeping on too fast to permit delay. The defendant, failing to obtain the co-operation of the plaintiff, proceeded to execute his own plan by the erection of levees upon his own property, and the construction of works thereon. These caused the damage to the plaintiff, as he alleges, and became the occasion of this suit.

It is disputed by the defendant that the works, erected by him, caused the damage. He charges that the seepage water was sufficient to have produced disaster to the plaintiff's crops, but it will be conclusive of the litigation, if we consider the matter in the light most favorable to the plaintiff, and as if the constructions of defendant had caused the damage.

The jurisconsults and tribunals of France have considered the questions presented in this case, not merely as abstract propositions, or naked principles, but in their practical application to actual events, and the consequences produced by them. France, like our State is traversed by rivers, whose banks are often unable to contain the swollen volume of water pent up between them, and give way under the pressure, or are submerged by the rising flood, until large tracts of country suffer from the inundation.

In Dalbon *contre* Graveson, it was held that—le propriétaire inférieur a le droit de construire des digues ou autres ouvrages pour se garantir de ces inondations, lors même qu'il aggraverait par la les dommages qu'elles peuvent causer aux propriétaires supérieurs. The Court delivering its reasons, or opinion, explain that the principles governing such cases are different from those regulating natural servitudes—que les ouvrages pour se garantir dans l'intérieur de sa propriété des débordements d'un fleuve ou d'un torrent sont régis par d'autres principes que ceux sur les servitudes naturelles—and proceed to declare, Que chacun peut se préserver dans sa propriété des débordements d'un fleuve lors même que les ouvrages faits pour s'en garantir porteraient préjudice au voisin. * * * qu'en effet il en est du débordement des rivières comme des incursions de l'ennemi, dont chacun peut, par le droit naturel, songer à se garantir, sans s'occuper du sort de son voisin, qui n'aurait pas la même prévoyance. *Journal du Palais*, 1813, p. 384. And this was re-affirmed later. Duvernoy *contre* Sampso, *Idem*, 1861, p. 888.

The syllabus of these two cases is almost in the language of Lalaure when treating of this subject: le propriétaire inférieur a le droit de construire des digues pour se préserver de l'inondation du torrent ou du fleuve qui borde son héritage encore ses digues fassent refluer les eaux d'une manière préjudicable aux voisins. Edition 1827, p. 655.

Chardon, treating of the obligations of the proprietor, says ;—Tous

les ouvrages qu'ils jugent propos à garantir leurs propriétés des désastres d'un débordement, soit en élevant leurs terrains jusqu'au bord du de la rive, soit par des digues, des chaussées, ou des murs construit sur leur propre sol et hors du lit du cours d'eau, peuvent être executés à leur gré. * * * Il est cependant certain qu'il ne peut ainsi refuser le passage aux grandes eaux qu'en les repoussant ailleurs, et par la exposant les autres riverains à supportés les désastres qu'il redoute pour ses héritages, néanmoins, il use d'un droit légitime, il est d'autant moins responsable des conséquences que les riverains peuvent, par de semblables travaux, les éviter; que, s'ils ne le font pas, ils devront s'en prendre, non à ce propriétaire vigilant, mais à leur indolence. *Droit d'Alluvion*, 345.

So Demolombe, reiterating what had been taught by his predecessors with striking unanimity, that a proprietor has a right to protect himself from damage by an overflow by the erection of works on his own land, even though they should cause the overflow to be more hurtful to his neighbor, continues;—Et lors même que l'effet de ces travaux, plantations, digues, ou autres, serait, comme il arrive presque toujours, de rendre les eaux plus hostile et plus dommagéable sur autres fonds, les propriétaires de ceux-ci ne seraient pas fondés à se plaindre; car chacun peut en faire autant de son coté; ce droit de préservation et de légitime défense est réciproque; il était impossible que la loi imposât aux propriétaires riverains des fleuves et des rivières l'obligation de laisser dévorer leurs fonds sans pouvoir rien faire pour les garantir. * * * Ces principes, si conformés à la raison et à l'équité, ont été de tous temps reconnus, soit en droit romain, soit dans notre ancienne jurisprudence française; et ils sont encore aujourd'hui consacrés par l'accord unanime des arrets et des auteurs. *tome* 11, No. 30.

To the plaintiff's demand, the defendant opposes these legal principles which we think protect him from liability for any damage that may have been occasioned by the works erected by him on his own land for his own protection. But he goes further, and maintains that the plaintiff's injury from the overflow occurred, irrespective of any act done by him, the defendant. Turjeon, who speaks intelligently, was on the spot all the time, and was the plaintiff's overseer at the time, says, the water was in the plaintiff's field before the pump began to work, or the dam was removed. This was the seepage water, which got into the plaintiff's field because his levee was bad, as this witness testifies, and besides, the water was passing into the defendant's field before the dam was cut. He says distinctly, in his belief, the dam would have been washed away any how, and we (Mailhot's place) would have been inundated, and that if there had not been any levee at all made on Pugh's plantation, the Mailhot place would have been drowned out much faster.

The defendant explained to the plaintiff his whole plan of defence against the back water as early as the first of May. He had formed the plan on 27th. April, and explained it to Mr. Rogers, his overseer, and directed him to set to work to execute it. It was done. The different levees were constructed, and the water that had collected inside of them was drained or forced out by means of the pump, upon the abandoned land outside of his levees. But before the completion of these works, or rather at the very commencement of them, Rogers, finding that the waters were backing up the canal or ditch, which ran parallel with the division line between the two places, but is cut wholly on Pugh's land, without orders, put up a small dam on the canal. This dam was fifteen or eighteen inches above the water, and was not intended to be permanent. During its construction, work was hurrying on the levees. The canal was an open drain for the Pugh plantation, and at the time the dam was placed in it, was the only ditch of that plantation open to the rear. The dam remained until the 12th. of May, when the pump having been erected, and the levees of defendant completed, and the pump ready to start, defendant ordered Mr. Rogers to cut the dam. This was done. At the time of the cutting, under the testimony, it appears the water was running over it twelve or fourteen inches, and had been so running for eight or ten days. The dam cut, defendant's pump started and drained water from the inside of his levees out, and on to the surface of his abandoned land.

The cutting of this dam, and the continued working of the pump, plaintiff alleges, was the direct and immediate cause of the inundation of his land, and the damage to his crops. The waters commenced to rise on April 27th., and commenced to fall on May 22d.

It seems certain that if the dam had not been cut on the 12th., it must have given way under the pressure of the constantly swelling volume of water, but if it could be indubitably established that it would not have given way, plaintiff had a right to cut it. Its temporary location in the canal was intended only to serve a transient purpose, viz to hold the waters in check until the system of connected levees should be completed. Surely the defendant was not bound by any principle of law or ethics, to sit with folded hands, and see his property engulfed by the floods that were spreading like a sea all around him, because the plaintiff did not choose to join with him in a plan of common defence, or did not choose to protect himself by works of his own.

The Code rises into the domain of morals, and stamps an ethical principle with legal sanction, when it declares, that every act whatever of man, that causes damage to another, obliges him to repair it by whose fault it happened. But the act which one has a right to do, and which an imminent peril requires him to do, to avoid a disaster that is

hurrying towards him, is not a fault. And if it were, he who has by his fault contributed to that of the other—who has by obstinacy or bad judgment, or negligence, or indolence, himself been the author of his own misfortunes, and through these or like causes, has contributed to produce the condition of which he complains—cannot invoke in his behalf, and for his indemnification, an equitable principle which was intended to apply only for the benefit of those who are without fault in the particular matters that form the subject of complaint.

The judgment of the lower court is affirmed.

Rehearing is refused.

No. 7077.

A. F. COCHRAN vs. OCEAN DRY-DOCK COMPANY. JOHN L. STERRY ET AL., THIRD OPPONENTS.

A claim for taxes by the State will not be allowed when there is no proof of its registry or existence.

The city of New Orleans is not entitled to a preference for license dues, unless its claim for the same has been registered.

The lessor of land fronting on a river and leased for dockyard purposes, is entitled to the lessor's privilege on the dock itself, when the dock is attached in front of the land by a permanent staging, and for a permanent purpose.

The stockholders of a corporation have no right to appropriate any part of its assets to pay salaries due them as officers of the company, or due them on any other account, until all creditors, who are not stockholders, have been paid.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

Bentinck Egan for plaintiff and appellant.

W. W. King, Horace E. Upton, Sam'l P. Blanc, Hornor & Benedict, and *Braughn, Buck & Dinkelspiel* for opponents and appellees.

The opinion of the court was delivered by

DEBLANC, J. Under a writ of *fieri facias* issued out of a judgment obtained by plaintiff against defendant, the dry dock and its appurtenances belonging to the latter were seized and sold for $7300. The proceeds of that sale are in the hands of the sheriff, and the object of this litigation is to regulate, between the creditors of defendant, the distribution of said proceeds.

Who are those who claim to be its creditors?

1. The State of Louisiana, for the taxes of 1874, 1875 and 1876, amounting, in the aggregate, to $493, and two per cent thereon for attorney's fees. No proof has been introduced of either the existence or registry of that claim, and it should not have been allowed.

26 A. 592.

2. The city of New Orleans, for a license of 1876, two hundred dollars. The evidence that such a license was due has not been recorded, and the city is not entitled to a preference which can be acquired—as to third parties—but from the date of the registry prescribed by our constitution and laws. C. 123. 26 A. 80. 350. 592. 28 A. 496.

3. Peter Marcy, as a lessor, $1836.33, with interest and costs. He—in 1865—leased to one Spencer Field a shipyard fronting on the Mississippi river. The rent of that property, from 1867 to 1875, was paid by the defendant, and it is manifest that—since its formation—the company has had control of that property and has used it for its exclusive benefit. The lease was renewed and extended by its own officers.

Those who oppose this claim contend that the company's dock was in the river, at a distance of sixty or one hundred feet from the bank, and that Marcy had no privilege thereon, because it was not on the property leased by him. The dock was attached in front of said property for a permanent purpose, and connected with it by a permanent staging. Without the yard, the dock would have been useless to the company, and the lessor's privilege did extend to and embrace it.

5 A 36—6 A. 452. C. C. 2705.

4. John G. Follett and Thomas G. Mackie—as also Spencer Field and J. B. Williams—were stockholders in the Ocean Dry-Dock Company, and their liabilities as such must be satisfied before their salaries as officers of said company. The claims of said Follett and Mackie, that of N. C. Folger, as transferree of Spencer Field, and of Francisco Villegas—as transferree of J. B. Williams, may be due, but can be legally paid only out of any balance which may remain of the proceeds in the sheriff's hands, after a full satisfaction of those creditors who are not members of said company and who did not share in the division of its stock. It is in evidence that Follett, Mackie, Field and Williams divided among themselves, in settlement of their salaries twenty-eight thousand dollars worth of that stock.

"The stockholders have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves to the prejudice of the members or creditors. Nor are they entitled to any share of the capital stock, or to any dividends of the profits, until its creditors are paid.

"The property of the corporation in equity is regarded as held in trust for the payment of its debts; and a sale of its capital stock, and a division of the proceeds among the directors, will not defeat the rights of creditors." 2 R. R. 573. Field on Corporations, §172 and 173, p. 187. Chicago R. R. Co. vs. Howard, 7 Wall. 392. Jackson vs. Ludeling, 21 Wall. 916.

5. C. B. Johnson is the holder of a note of $1000, signed by Spencer

Field as president. This claim was dismissed by the lower court. The evidence establishes that this note was held by Folger until after its maturity. Spencer Field took it from him and placed it in the hands of the company's attorney for collection against the company. He swore that it was given for a loan from Folger to the company, and that the amount thereof was deposited in the New-Orleans National Bank. The company's cash-book shows no such entry, and the evidence adduced in support of that alleged loan and of the disposition made of the same is as vague as unsatisfactory. The loan was not authorized by a resolution, and two of the managers and directors swore they had no knowledge of it. Johnson was not even called as a witness, during the trial, to sustain his own demand. His silence and the circumstances which surround Field's course as to that note, justify the belief that said note represents a fraction of the claim which he considered he could justly realize from the company. He was—he said—under the impression that—as president of said company—he could not sue in his own name, and we are left under the unremoved impression that he alone has an interest in the judgment obtained by Johnson. That judgment entitles him to only a proportionate share in any balance that may remain to be distributed among the stockholders.

6. As to those creditors who are not stockholders or the transferrees of stockholders, and who have caused execution to issue out of the judgments rendered in their favor, they have the privilege which results from their respective seizures and must be paid—after satisfaction of the costs incurred in this case and the lessor's claim—in the order in which their seizures are levied. The creditors to be so paid are A. F. Cochran, A. Martin, G. Lauson, John L. Sterry, Forstall & Delavigne and Peter Fink.

7. After satisfaction of the judgments referred to in the preceding paragraph, the claims of the city of New Orleans, Bentinck Egan and H. Cartens are the next in rank, and must be paid out of the proceeds of the sale; and any balance then and thereafter remaining in the hands of the sheriff, shall be applied to the judgments of C. B. Johnson, Thomas G. Mackie, J. F. Follett and Francisco Villegas, in proportion corresponding to the amounts of said balance and judgments. As stockholders or the transferrees of stockholders, after maturity of the transferred claims, the four last-named parties did not and could not acquire any preference over one another.

Of all the appellees, Bentinck Egan is the only one who has asked an amendment of the judgment of the lower court, and we cannot—as suggested—postpone the distribution of the proceeds of the sale, in the interest of those who have not appealed. To do that, we would have to remand the case.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court is amended as follows: Out of the proceeds of the sale retained by the sheriff, and after paying the costs incurred in this case, in this and the lower court, he shall pay the seizing and opposing creditors in the order hereinafter indicated, to wit:

1st. To Peter Marcy, as lessor, the several sums, with interests and costs allowed him by the judgment appealed from.

2d. *In the order of the seizures levied by them,* the judgments obtained by A. F. Cochran, A. Martin, G. Lauson, John L. Sterry, Forstall and Delavigne and Peter Fink, with the interest, and costs to which they are each entitled.

3d. To the city of New Orleans two hundred dollars—to Bentinck Egan five hundred and ninety dollars, to Brady and McLellan two hundred and forty-seven dollars and thirty cents, and to Henry Cartens one hundred twelve dollars and seven cents.

4th. To Francisco Villegas, J. F. Follett, Thomas G. Mackie and C. B. Johnson, the balance of the proceeds of the sale, in proportion to the amount of their respective judgments.

It is further ordered, adjudged and decreed that the opposition of the State of Louisiana is dismissed as in case of nonsuit, and its rights specially reserved, and that—as hereinbefore amended—the judgment of the lower court is affirmed.

Rehearing refused.

No. 5523.

L. C. PERRET vs. ALICE KING.

A stipulation made by the vendee of a newspaper to pay "all of the outstanding liabilities" of the paper, will not make the vendee liable for the damages for libel subsequently recovered against the vendor, in a suit pending when the sale of the paper was made.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier,* J.

Labatt & Aroni and *W. F. Mellen* for plaintiff and appellant.

Wm. O. Denégre and *Chas. E. Schmidt* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. In March, 1869, the plaintiff, appellant, instituted suit against Charles A. Weed, the owner of the "New-Orleans Times," a newspaper conducted by him, to recover $10,000 damages for libel. There was a verdict and judgment in favor of the defendant in that suit. Plaintiff appealed; and in March, 1873, this court reversed the judgment of the district court, and awarded to plaintiff $15,000 in dam-

ages against Charles A. Weed, proprietor of the newspaper styled "The New-Orleans Times." 25 An. 170.

In December, 1872, Weed was indebted to Mrs. Alice King, his vendor, in a sum exceeding fifty thousand dollars, on account of the price of the "Times" establishment; and he owed other debts, one to J. H. McKee for $7000. On the 13th December, he sold the entire "Times" newspaper establishment to Mrs. King, with all the assets, in consideration of which Mrs. King assumed the payment of "all the outstanding liabilities of the said newspaper known as the New-Orleans Times."

She also agreed to pay the debt due to McKee, and to cancel and return Weed's three notes in her favor, owned and held by her, each for $25,000, on one of which $20,000 had been paid.

This suit was brought to recover of Mrs. King the amount of the judgment in favor of plaintiff against Weed, with interest and costs, upon the allegation that it was one of the outstanding liabilities assumed by her in her agreement with Weed.

In her answer Mrs. King, after general denial, and admission that she was the owner of the "Times," specially denied that she had ever "stipulated or contracted or agreed to assume the payment of plaintiff's claim against C. A. Weed."

There were objections taken and reserved to portions of the parol testimony offered on the trial, which it is not necessary to notice now. This testimony tended to show what liabilities Mrs. King had assumed. The agreement offered in evidence was a copy published in the "Times" newspaper. The original had been lost or mislaid: and it differed from the original only in that there was attached to the original a list of the liabilities to be paid by Mrs. King.

Prima facie, this assumption by Mrs. King would be limited to what the parties understood as debts incurred in and about the conducting of the paper. Mrs. King's object was, manifestly, to secure, as far as she could, the large sum due to her on account of the price; and Weed's object was to rid himself of his personal liability for the debts which were acknowledged to be due, and which he desired to have paid. Whatever might be the amount so assumed by Mrs. King, it would diminish to that extent the net value of the establishment to her; and it would diminish the sum which would otherwise have been applicable to Weed's other debts, or to his other purposes, in the event that the value of the establishment was in excess of the debt due to Mrs. King.

It does not appear at what date, precisely, the verdict and judgment in favor of Weed were rendered; nor when the appeal was taken: but the case was pending on appeal in December, 1872, when Mrs. King became the proprietor. The proprietor of a newspaper, sued for libel,

would not rank that claim as one of his debts, nor would he, in disposing of his property, be inclined to reserve from the price a sum sufficient to cover such demand. He could not know, nor could the purchaser know, what amount might be awarded. The demand was for ten thousand dollars, with interest from March, 1869, and costs; so that if the seller had understood, and the purchaser had understood, that such demand was to be treated as part of the price, and assumed by the purchaser, the amount reserved would have been in excess of $10,000.

In this case there was a verdict and a judgment in favor of Weed, exonerating him from liability. The appeal did not set aside that judgment; and it would require very positive proof to show that either Weed or Mrs. King allowed this claim to enter into their estimation. Weed wished to pay what he considered his debts, liabilities. The books of the "Times" establishment showed the amount of the liabilities and of the assets: and an agent of Mrs. King had been in the office, "in possession of the whole newspaper, as the representative of Mrs. King," from the death of her husband. Weed desired to avoid being forced into bankruptcy. The "Times" establishment had been seized for the debt due McKee; and it was necessary to make some arrangement by which Mrs. King could be protected, and the threatened bankruptcy avoided. This agreement was the result of that condition of affairs.

If one should read the assumption clause in the agreement between Weed and Mrs. King, and the petition and answer in this case, and the decision of this court in March, 1873, as reported in 25 An. 170, his impression would be that a judgment against Weed, who had been the proprietor of the "Times" newspaper, for damages for a malicious libel, was not one of the outstanding liabilities of the "said newspaper" in December, 1872, when Mrs. King again became the proprietor. In libel suits the verdict of a jury in favor of defendant creates a very strong presumption of the absence of right to recover. The debts and liabilities of the newspaper, in general business parlance, would be construed to be such as created some legal or equitable right or lien upon the property, the types, presses, stock, etc.: such as wages, sums due for paper and other materials and supplies, and the salaries of editors and writers. There was no lien or equitable right upon the property, more especially against the vendor, Mrs. King, in favor of the plaintiff, who had been injured in his feelings, perhaps in his reputation, by the malicious wrong of Weed; and the interpretation which would make Mrs. King liable to plaintiff in this case, on the assumption in her agreement with Weed, is not that which the language necessarily imports; nor is it either just or reasonable.

If the case be considered without reference to the testimony objected to, the pretensions of plaintiff would be so extraordinary that they

could not be allowed. We think, however, it was competent to prove by the testimony of Green, who kept the books, who was Mrs. King's representative, and by Mr. Hunt, who, as her attorney at law and in fact, made the agreement with Weed in her behalf, that there was a list of debts, an estimation of the liabilities to be paid by Mrs. King, with reference to which this contract was made; and that the claim of plaintiff was not considered or taken into the estimation by either party.

The judge of the district court concluded that the liabilities of the newspaper, assumed by Mrs. King, in the absence of proof to the contrary, would be those arising *ex contractu*, not such as arose *ex delicto*; and this is our view of the law, and our interpretation of the agreement.

The judgment appealed from is therefore affirmed with costs.

Rehearing refused.

No. 7063.

THE NEW-ORLEANS CANAL AND BANKING COMPANY VS. THE CITY OF NEW ORLEANS. W. VAN NORDEN, INTERVENOR.

So much of section second of the act No. 41 of 1877 as provides "that all judgments for drainage of said lands, judgments creating liens and for assessments for drainage of said lands, and all proceedings pending therefor, be and they are hereby canceled and annulled," and so much of the first and second sections of said act as exclude certain lands from the limits of the drainage district and exempt them from all future drainage assessments, impair the obligations of existing contracts and are unconstitutional.

The Legislature can not so alter the charter of a corporation as to affect the rights of third persons previously acquired under the charter.

The city of New Orleans can not be compelled to re-imburse the drainage taxes voluntarily paid to the Drainage Commissioners, and actually expended for drainage purposes.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

G. L. Bright for plaintiff and appellee.

B. F. Jonas, City Attorney, and *Sam'l P. Blanc* for defendant and appellant.

Lacey & Butler for W. Van Norden, intervenor.

The opinion of the court was delivered by

DEBLANC, J. In 1858, several draining districts were established in the parishes of Orleans and Jefferson, and a Board of Commissioners appointed for each of said districts, for the purpose of reclaiming the swamp lands therein situated. To defray the construction of the works necessary to execute that *projet*, an assessment was to be levied by the commissioners, and the payment of the assessed contribution was secured by a first mortgage and privilege on the lands so situated.

Before 1877, plaintiff paid, for the intended drainage, twenty five thousand five hundred ninety eight dollars and sixty one cents, the whole of the assessments levied upon the lands it owns in the first drainage district, and now seeks to recover back that amount, on the grounds:

1. That the consideration for which it was paid has entirely failed.

2. That, by act No. 48 of the General Assembly of 1877, its lands have been excluded from the drainage districts and from the benefits of drainage.

3. That—by one of the provisions of the aforesaid act—all judgments obtained for drainage in the several districts herein mentioned, and creating liens on the lands therein comprised, and all legal proceedings instituted for that object, have been annulled and canceled.

To plaintiff's demand the city answered:

1st. By a general denial.

2d. That the assessments paid, and the re-imbursement of which was demanded, were all paid under a judgment rendered in "the matter of the Board of Commissioners of the Second Drainage District, by the Second Judicial District Court, which judgment was *res judicata* and a perpetual bar to any reclamation.

3d. That plaintiff had voluntarily paid said assessments now reclaimed.

4th. That the judgment rendered in the matter of the New-Orleans Canal and Banking Company vs. City of New Orleans, No. 3375, of Fifth District Court for the Parish of Orleans and known in the Supreme Court as No. 4350, formed *res judicata* and was a bar to plaintiff's demand.

5th. That plaintiff had never paid any part of its assessment to the city of New Orleans; but had paid all to the Board of Commissioners of Drainage for the First Drainage District, long before act No. 30, of 1871, had made the city officers the collectors of the "drainage tax," and such payments had all been expended in drainage work.

6th. That the city of New Orleans was not authorized nor empowered by any law to raise money for, or to pay, such as the plaintiff's demand.

7th. That act No. 48, of 1877, was contrary to sections 105, 109 and 110 of the State constitutions of 1852, 1864 and 1868, respectively, and of section 3, article 6; article 5 of amendments of 1791; of section 10, of article 1, and section 1, of article 14 of the Constitution of the United States, in that it impaired the obligation of contracts and divested vested rights in this wise. That under act 30, of 1871, a large amount of drainage work had been done, in payment of which drainage warrants had been issued; that subsequently, under act sixteen, of 1876,

and pursuant to city ordinances, the city of New Orleans had purchased the franchises to do the drainage work and great quantity of machinery, boats, etc., for such purpose, for all of which it had paid in drainage warrants. That these warrants, to a very large sum, were issued on the faith of the drainage tax, were only payable therefrom. That the withdrawal of any part of the tax, the destruction of any of the sources whence it must be drawn or the loss of the security found alone in the judgments and liens obtained for the collection of the same, impaired the obligation of such contracts and divested vested rights.

8th. That said act 48 of 1877, was further unconstitutional, because it destroyed uniformity and equality of the tax or assessment, relieved many in tne taxing district from the obligation they were bound to share in common with all; imposed double taxation on those not so relieved and was partial legislation, all contrary to articles 123, 124 and 118, of State constitutions of 1852, 1864 and 1868, respectively, and the aforesaid articles of the constitution of the United States.

Section 2d, of act 48, regular session of 1877, is as follows:

"That all judgments for drainage of said lands, judgments creating liens, and for assessments for drainage of said lands, and all legal proceedings pending therefor, be and they are hereby cancelled and annulled; *provided*, that the benefits of this act shall not be invoked in favor of any land until the State and city taxes due thereon are paid: *provided further*, that all lands situated within the above described lines, and excluded by this act from the drainage limits established under previous laws, and upon which drainage taxes or assessments have already been paid, shall hereafter be exempt from all future drainage assessments."

By the act of 1858, No. 165, "to provide for leveing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," three draining districts were established, and a Board of Commissioners for each district. The Board of Commissioners were invested with all the rights and powers necessary to drain the several districts. It was made their duty to cause plans of the sections or districts to be drained to be made and deposited in the office of the recorder of mortgages—to apply to a district court for a decree that each portion is subject to a first mortgage lien and privilege in favor of the Commissioners for such amount as may be assessed on the property for its proportion of drainage.

They were then authorized to levy an assessment upon the superficial square foot to defray the construction of the work. A remedy for its collection was given.

The first section of act No. 51 of 1869 provides, that the three drainage districts are consolidated, the property of the three draining dis-

tricts are transferred to the mayors of New Orleans, Jefferson City and Carrollton and the police jury of the parish of Jefferson, left bank, and "all other property, such as maps, plans, tableau, all books pertaining to the business of said draining districts, all moneys and credits, deeds, mortgages and all other evidences of title to real estate and all assessments of taxes, etc., shall be turned over by the Commissioners of said drainage districts, to the Commissioner of Drainage whose appointment is hereinafter provided for."

The second section provides for the appointment of Commissioner of Drainage.

The draining of the several districts was and continues to be but one, a common and indivisible enterprise. Every canal, ditch or levee necessary to complete it, must be dug or built, not at the costs of only a fraction, but at the costs of every fraction of each of said districts: otherwise, it might happen that those who have not, or who have the less contributed to the partial execution of the common enterprise, would alone benefit by the partly accomplished work paid for by others.

If, considering the *projet* an impracticable one, the Legislature had repealed every law providing for the drainage of lands in the parishes of Orleans and Jefferson, its action would not have amounted to a violation of the constitution, but the Legislature could certainly not select, within the limits of the districts which—for nearly twenty years—have been subjected to the burdens of that common enterprise, lands which shall and others which shall not continue to bear the already imposed, fixed and determined burdens, much less could it ordain and command that the mortgages and privileges which are—not an exclusive pledge of the State—but the pledge of the creditors of the several districts, and—indirectly at least—of those who have paid the assessed contributions, shall be remitted, cancelled and annulled.

Were it to the interest of the State, the city or those concerned in said enterprise, that the territorial limits of said districts should be reduced, that reduction could—in no way—authorize even the Legislature to distinguish between the lands embraced within the limits as originally fixed, to exclude a portion of said lands from the benefits of the proposed drainage, and to exempt the excluded portion from the charges and liabilities actually incurred for work already done, determined and accepted. These liabilities and benefits must be borne and shared by all.

We unhesitatingly acknowledge—as contended by plaintiff's counsel—that the whole of the expense of an improvement may be imposed by the Legislature, not on merely the owners of the property to be specially benefitted by the improvement, but on the whole of the corporation. This it can do, when the entire corporation is to be thereby

benefitted—but we as unhesitatingly deny that the Legislature can—lawfully—order, in any specified locality, a work of admitted and general utility to every portion of the same, and arbitrarily ordain that—to pay for the price of that public work—a tax shall be levied on exclusively the eastern section of that locality.

It is manifest that so much of the second section of act No. 48 of the General Assembly of 1877, which provides "that all judgments for drainage of said lands, judgments creating liens and for assessments for drainage of said lands, and all proceedings pending therefor, be and they are hereby cancelled and annulled," and so much of the first and second sections of said act which exclude certain lands from the established limits of the drainage districts and exempt them from all future drainage assessments, impair the obligation of existing contracts, destroy acquired rights and violate the letter and spirit of our constitutions.

The debt legally contracted by or for the three districts is a collective debt, secured by a proportionate charge imposed on every tract of land included within their well-defined boundaries, and—until that debt be paid, or its invalidity judicially assailed and judicially decreed, in a proper suit, against the proper parties, and on proper evidence, the imposed charge shall continue to subsist. The Legislature has not, and cannot lawfully exercise the extraordinary prerogative of ordaining that the indisputable obligation of one hundred parties, shall—though not reduced in amount—cease to exist as to ninety of those parties, and—by an arbitrary enactment—declare it to be and make it the obligation of the remaining ten.

"The requirement of apportionment is *imperative*. And whenever the tax is a direct levy on property, there must be a taxing district. Given a tax and a district, then the sum demanded of any one person, or laid upon any one parcel of property must have a *fixed* relation to the whole tax, as well as to that demanded of every other person or laid upon every other piece of property." Cooley, Taxation, p. 159; Henry vs. Chester, 15 Vt. 460; Tide Water Co. vs. Coster, 18 N. J. Eq., 518. See, also, Wilson vs. Supervisors of Sutter, 47 Cal. 91; Woodbridge vs. Detroit, 8 Mich. 274, 309.

"Though the districts are established at the discretion of the Legislature, the basis of apportionment which is *fixed upon must* be applied *throughout* the district." Cooley, Tax., 180; O'Kane vs. Treat, 25 Ill. 557, 561; Fletcher vs. Oliver, 25 Ark. 289.

"There cannot be two rules of apportionment for the same district; if there could be, there might be any number, and in effect there would be none at all, and every man might be assessed arbitrarily." Cooley, *Ib.* 180; Tide Water Co. vs. Coster, 18 N. J. Eq. 518.

Burroughs holds "that the Legislature may, at any time, alter or modify the powers of municipal corporations: but when under the exercise of powers delegated, the rights of third persons have accrued, and they have assumed the form of a contract with the corporation, the Legislsture can not change the powers of the corporation so as to impair the rights of its creditors. The Constitution of the United States prohibits the States from enacting any law impairing the obligation of the contracts, and while the Legislature may alter or modify the powers of the subdivisions of the State, such alteration can not be allowed to affect the creditors of such subdivisions. They are entitled to claim that the corporation shall exercise such powers as it had at the time the contract was made. One of the classes of cases cited is when—after the subscription and issuing of bonds, the rate of taxation by the corporation is limited. In such cases the limitation does not affect the right of the creditor to have a levy made to pay his debt, although it may be necessary to exceed the limit. The operation of the act is prospective; and it cannot be construed retrospectively, so as to deprive the creditor of the right to the levy as it existed when the contract was made."

B. p. 427—4 W. 535—9 W. 477—25 Wis. 122—31 Penn. 175—51 Ill. 147—45 N. Y. 234—6 Kansas 256—25 Cal. 638.

"It is not in the power of the Legislature, under the guise of taxation, to give the property of A to B, or to impose the whole burden of a tax for the State upon one county," and—for the same reason—the burden of a tax for a county on entirely one of its sections. "It is wrong that the whole should be taxed for the benefit of the few, and equally wrong that the few should be taxed for the benefit of the whole." Burroughs p. 22. The improvement necessary or indispensable to, and undertaken by a district, must be—not merely commenced—but executed either in whole or in part by the entire district. Unless or until all are relieved by the execution or failure of the undertaking, or—according to circumstances—by the satisfaction of the full or proportionate share of their liability, all are and remain bound.

We find, in the record, that—in the excluded district—the assessments already paid amount to upwards of two hundred and forty thousand dollars, and that but an insignificant fraction of that large sum has been received by the city and its officers. Is it liable for the re-imbursement of the whole or of any part of that amount?

Were we to consider, as conclusive evidence, the declarations contained in acts of the Legislature, that the districts have not been protected from overflow, that the laws enacted for their drainage have failed in their purposes, would that be sufficient to establish that the work contracted for and done, in furtherance of the *projet*, has not

been performed at all, or not performed according to the terms of the contracts, and that every outstanding warrant given as the price of that work is without consideration? Would those declarations—if taken as evidence—be sufficient to authorize the court to pronounce, in this suit, that in whosoever hands those warrants may have passed, and whether those by whom they are held and due be or not before us, they are invalid and void, worthless as to the creditors, binding on no one, and that every guarantee, mortgage and privilege securing their payment must be cancelled, erased and destroyed? We b[illegible]ot.

Judge Dillon—in his book on municipal corporations—states as follows the general rule in regard to the recovery of taxes already paid: to justify the claimant's action, three principal facts must concur:

"The authority to levy the tax must be *wholly wanting*, or the tax itself wholly unauthorized; in which cases the assessment is not simply irregular, but *absolutely* void. 2. The money sued for must have been *actually received* by the defendant corporation, and received by it for *its own use*, and not as an agent or instrument to assess and collect money for the benefit of the State, or other public corporation or person; and 3, the payment by the plaintiff must have been made *upon compulsion*, to prevent the immediate seizure of his goods or the arrest of the person, *and not voluntarily*. Unless these conditions concur, *paying under protest* will not give a right of recovery. The same principles are applicable to actions for the recovery back of money paid for *illegal license taxes or fines* imposed by a municipal court."

The taxes, the amount of which plaintiff seeks to recover from the city, were assessed and collected under the authority of several acts of the Legislature; and every cent of the drainage assessment paid by plaintiff to the city, was paid without compulsion and applied to the satisfaction of drainage warrants. As to the most of the drainage taxes levied on plaintiff's land, they were received and disposed of by the Board of Commissioners, and neither in law nor in equity, can the city be held liable for their application, misapplication or re-imbursement.

We conclude that plaintiff has not shown that its drainage taxes were levied and paid without consideration, and that it was shown—in so far as defendant is concerned, that said taxes were voluntarily paid and properly disposed of. Under these circumstances, plaintiff cannot recover.

As no decree based on any of the pleadings could have—in any way—affected or impaired the alleged rights of Warner Van Norden, his intervention has no legal ground to stand upon.

It is—therefore—ordered, adjudged and decreed that the judgment of the lower court in favor of plaintiff and against the city of New Orleans, rendered on the 17th and signed on the 22d of January 1878,

be and it is hereby annulled and reversed, and that—in lieu of it—there be judgment in favor of the city of New Orleans and against the plaintiff, rejecting the latter's demand.

It is further ordered, adjudged and decreed that the intervention of Warner Van Norden be dismissed as in case of nonsuit: the costs of the appeal to be paid *in solido* by plaintiff and intervenor—and those of the lower court, by Van Norden as regards the intervention, the others by plaintiff.

Rehearing refused.

No. 5779.

SAMUEL & A. W. SMITH VS. CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

The *bona fide* sale of the stock of an incorporated company, coupled with a power of attorney to the vendee to transfer it on the books of the company, is made complete by the delivery to the vendee of the certificate of stock. It is not necessary to the perfection of the sale, and the consequent protection of the stock from the seizure of the vendor's creditors, that notice of the sale should be served on the corporation, or that an actual transfer of the stock should have been made on its books.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

Henry C. Miller for plaintiff and appellee.

Hornor & Benedict and *Thomas J. Semmes* for defendants and appellants.

The opinion of the court was delivered by

MARR, J. In February, 1872, Samuel and Andrew Smith purchased of C. Mehle & Co. one hundred shares, reduced to fifty, of the capital stock of the Crescent City Live-Stock Landing and Slaughter-House Company; and of C. Mehle ninety shares, reduced to forty-five. The purchasers paid the price, the current market rate; and the two certificates representing these shares were delivered to them, with two powers of attorney, in each of which there was a blank for the name of the person to whom the transfer was to be made, authorizing Charles Kilshaw to transfer, on the books of the Company, the shares standing in the names of C. Mehle and C. Mehle & Co., respectively.

A by-law of the corporation we presume, we do not find it in the charter, provides that "all transfers of stock shall be recorded in the office of the said company, in a book of transfer to be kept for that purpose:" and the two certificates in question state that the shares are transferrable only on the books of the company, in the one case by C.

Mehle & Co. or their attorney, in the other by C. Mehle or his attorney, on the surrender of the certificates.

It appears that no notice was given to the company, and there was no transfer on the books of the company; but the certificates and powers of attorney remained in the possession of the purchasers from the date of the purchase.

Some time after this purchase, the Bank of America, a judgment creditor of C. Mehle and C. Mehle & Co. *in solido*, seized these shares of stock as the property of their debtors, under execution and garnishment in the hands of the company; and they were sold by the sheriff and adjudicated to Thomas Serrill. Thereupon Samuel and Andrew Smith brought this suit to enjoin the transfer of the stock to Serrill; and they prayed that they be decreed to be the lawful owners, and be recognized as such by the company. In consequence of this suit Serrill did not pay the price of the adjudication.

The district judge perpetuated the injunction granted *in limine;* and decreed that the Smiths be recognized to be the owners of the stock; and that it be transferred to them on the books of the company. From this judgment the company, Serrill, and the Bank of America appealed separately.

The question is, whether the title and possession vested in Samuel and Andrew Smith, by the delivery of the certificates and the powers of attorney to make the transfers on the books of the company, so that the stock was no longer subject to seizure, under execution, as the property of C. Mehle and C. Mehle & Co., the judgment debtors.

The appellants maintain that the certificates of stock are not negotiable; and that there was no such delivery to the Smiths as the law requires, because there was no transfer on the books of the company, and no notice given to the company. They rely on articles 2643 and 3160 of the R. C. C., the first of which declares that "the transferree is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place": and the latter provides that "when the thing given in pledge consists of a credit not negotiable," the proof of the pledge must be by authentic act, or by act under private signature duly recorded, and a copy of the act must have been duly served on the debtor of the credit given in pledge." They also cite and rely upon Harris vs. the Bank of Mobile, 5 An. 538.

The law requires tradition in order to make the sale of a thing complete as to third persons; and delivery is an indispensable condition of the contract of pledge. Whatever would constitute delivery, under the contract of sale, would be also a delivery under the contract of pledge, and *vice versa.*

The Civil Code required certain formalities, for the contract of pledge,

among others a notarial act, or an act under private signature registered in the office of the notary, containing an accurate description of the thing pledged. These formalities were obstructions to commerce; and were felt as a serious inconvenience. In 1852 the Legislature passed an act relative to pledges, which was re-enacted in the general compilation of 1855, and in the Revised Statutes of 1870; and was incorporated in the R. C. C., art. 3158. The first section provides that "When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations, or claims upon other persons, he shall deliver to the creditor the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned; and such pawn, so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith."

By section three of this act, the substance of which is in the R. C. C., article 3160, and was in the Civil Code, article 3127, "If a credit not negotiable be given in pledge, notice of the same must be given to the debtor."

The stock in an incorporated company is not a debt due by the corporation to the corporators; nor is it a credit of which the corporation is the debtor. The corporators in the aggregate own the stock, according to their respective shares and portions; and it can no more be said that the shares of a corporator constitute a credit, a debt due to him by the corporation, than it could be said that the joint owners of a house or a ship are the debtors of each for his share.

It was well said in Harris vs. the Bank of Mobile, 5 An. 539, that the officers of a corporation are the keepers and possessors of the undivided property of the corporation for each and all of the stockholders; and the certificates of stock are the evidence of the ownership of that property in the hands of the holders. The word "credit" is used in the act of the Legislature and in article 3160 of the R. C. C. to signify a debt, something due to one person by another; a right on the one part, and an obligation on the other, which create the relation of debtor and creditor between the two persons. It is clearly not applicable to the shares in an incorporated company, which do not constitute a debt, and of which no one is the debtor.

The second clause of article 3158, section one, of the act of the Legislature, authorizes the pledge of notes, bills, stocks, obligations, or claims upon other persons, by the delivery of the notes, or bills, or certificates of stock, or other evidences of the claims or rights so pawned, without further formalities. If the thing so pawned or given in pledge be a credit, a debt not negotiable in the legal sense of the term, due to the pledgor by another who is his debtor, then the pledge is not valid against third persons unless that debtor has been served with notice.

The R. C. C., treating of the tradition or delivery of the thing sold, declares that "The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer": article 2477; and, according to article 2481: "The tradition of incorporeal rights is to be made either by the delivery of the titles and of the act of transfer, or by the use made by the purchaser, with the consent of the seller."

We have in this case all the requirements of these two articles for perfect tradition. The certificates of stock were the evidences of ownership, the titles of the incorporeal rights represented by them; and these certificates were delivered to the purchasers. The powers of attorney to Kilshaw, who was acting merely for the Smiths, authorizing him to make the transfers on the books of the company, were coupled with an interest which made them irrevocable. They constituted the acts of transfer, as between the sellers and the purchasers; and no other act was necessary, or could have been required of the sellers, to divest themselves of title and possession. Having the certificates in their possession, the purchasers had a complete guaranty that the corporation could not transfer the stock to their prejudice, since the corporation had bound itself to hold these shares subject to transfer by the sellers or their attorneys, on the surrender of the certificates. By producing these certificates, and the powers of attorney, the Smiths could have compelled the corporation, at any time, to have the transfers made on their books; and the corporation had no power to transfer to any other than the holders of these certificates and the powers of attorney. The thing sold, therefore, had passed beyond the power and control of the sellers, and into the power, possession, and control of the purchasers.

Articles 2642, 2643, of the R. C. C. relate exclusively to the transfer of credits, rights, or claims against a third person. The word "to," as used in article 2642, is a mistranslation of the word "sur," in the Code Napoleon, article 1689, from which it was copied literally into our Code. The word "to" does not make sense; and the whole context shows that the article is dealing only with the credits, rights, and claims which the transferror has upon or against a third person who is his debtor with respect to such credit, or right, or claim.

Article 2643, which requires notice to the debtor of the transfer having taken place, is clearly not applicable to all the credits, rights, and claims referred to in article 2642. Promissory notes and bills of exchange, essentially negotiable, pass to the transferree without notice to the debtors, the makers, accepters, drawers, indorsers; and yet they are credits, rights, claims upon or against third persons. Article 2643, therefore, must be restricted to such credits, rights, and claims as create the relation of debtor and creditor between the transferror and him who owes, is bound to acquit these credits, rights, and claims; and it must

also be restricted to such credits, rights, and claims as are not evidenced by a negotiable instrument.

The by-law which requires transfers of stock to be recorded on the books of the corporation regulates merely the respective rights of the corporation and the individual stockholders. No one can claim to be a stockholder, and to exercise the rights of a corporator, in virtue of a sale of stock to him, until the corporation has taken cognizance of the sale, and, by transfer on its books, has substituted the purchaser for the seller. Whether one has acquired the character and the rights of a corporator, is a question to be determined by the laws of the corporation. Whether a purchaser has acquired a good and perfect title to any property or thing, tangible or intangible, is a question to be solved by the general laws of the State applicable to the sale and transfer of such objects. Samuel and Andrew Smith may not be corporators in this company, by reason of their neglect to comply with the requirements of the charter and by-laws; but they may, nevertheless, be the owners, by perfect titles, of the shares of stock purchased by them.

In Bank vs. Lanier, 11 Wallace, 369, the Supreme Court of the United States had occasion to consider the effect of a stipulation in certificates of stock almost identical with that in the two certificates in this case, that the stock should be transferrable only on the books and on surrender of the certificates. The court regarded the power to transfer their stock as one of the most valuable franchises that could be conferred on corporations, and said that no better form of certificate could be adopted to assure the purchaser that he can buy with safety. "He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise."

The court went on to say that this certificate was "a notification to all persons interested to know that whoever, in good faith, buys the stock, and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificate."

We understand this to be settled law in New York, Connecticut, and New Jersey; and we do not think the law could be different elsewhere, in the absence of positive legislation to the contrary. The distinction is plain between the requirements of the law in order that title and possession shall vest in a purchaser, and the requirements of the charter and by-laws of a corporation in order that the holder and owner of a title to shares of the stock shall receive from the company a certificate of own-

ership, in his own name, and be admitted to the rights and privileges of a corporator.

There is an immense amount of the wealth of the country invested in stocks of the numberless corporations which have sprung into existence within a few years past. These stocks afford a most convenient and valuable basis of credit; and they are sold to a large amount daily, at all the great commercial centers. The holder who does not wish to sell may pledge his certificates for loans and discounts to an amount approximating their market value, with a reasonable margin for possible depreciation. The pledgee does not desire to become the owner of the stock; and he would not think it necessary, nor would he have the right, to surrender the pledged certificates and have the stock transferred to him on the books of the corporation. Nor do we think the validity of the pledge could be made to depend on the giving of notice to the corporation, because the corporation has no power or authority to dispose of the stock, or to transfer it, so long as the certificates are not produced and surrendered. If the pledgee were required to have the transfers made on the books of the corporation, or to give notice, the value of these certificates as a basis of credit would be greatly impaired, particularly where the pledge is made at a distance from the domicile of the corporation.

We entertain no doubt but that the act of 1852 was designed for the public convenience by facilitating the pledge of stocks and other securities; and it required nothing more for the perfection of the contract than the delivery of the certificate of stock. But if this suffices for the perfection of this contract, it is because the delivery of the certificate is the only delivery that can be made of the stock which it represents; and that delivery is effectual, whether it be under the contract of pledge or the contract of sale.

The certificates in this case are in the usual form: a form which has been adopted throughout the United States, as well for the benefit of corporations, by encouraging investments in stocks, as in the interest of the public, to make these stocks a secure basis of commercial transactions, whereby their value is enhanced. These certificates are not promises to pay: they contain no words of negotiability, and they are not negotiable, in the ordinary sense of the term; but, as the court said in Lanier's case, 11 Wallace, 377: "Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. They have become the basis of commercial transactions in all the large cities of the country, and are sold in open market, the same as other securities."

We find nothing in Harris vs. Bank of Mobile, 5 An., which militates against the views we have expressed. That case is not applicable to

this, because the title under which Harris claimed the stock seized by the bank was acquired more than four months after the seizure; and it was alleged that his title was simulated and fraudulent, as it afterward was proven to have been. Bank of Mobile vs. Harris, 6 An. 811.

This case is not complicated by any question of fraud or simulation in the title under which the purchasers claim, nor of pre-existing right in the seizing creditor. On the contrary, the purchase was made in good faith, at the current market rate, and in the usual course of business; and the evidences of title and the power to transfer were delivered to the purchasers long before the seizure. The title thus acquired was as complete as the nature of the objects of the purchase would admit of; and the subsequent seizure by a judgment creditor of the sellers was without effect, and it can not defeat or impair the right of the purchasers to have the shares of stock transferred to them on the books of the corporation, in accordance with the terms of the certificates and powers of attorney held by them.

The judgment appealed from is, therefore, affirmed with costs.

No. 6661.

U. OZANNE VS. ABRAHAM HABER.

A promissory note which has for its consideration the discontinuance, by the holder of the note, of certain criminal proceedings instituted by him against a party for obtaining money under false pretenses, is void.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Labatt & Clinton for plaintiff and appellant.

Braughn, Buck & Dinkelspiel for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. This suit is upon three promissory notes, aggregating one thousand and thirty-nine 50-100 dollars, each having these words after value received "as per agreement made this day between A. Haber and U. Ozanne." The defendant is sued as indorser. The defence is fraud, and want of consideration.

The plaintiff, residing at Sardis, Miss. had made an affidavit against one Collins for obtaining money under false pretences, and had obtained a requisition from the Governor of that State upon the Governor of Louisiana, and had secured the arrest of Collins in New Orleans, and imprisoned him for safe keeping until he could be sent back to Mississippi. Collins had inveigled Ozanne into an advance of money for the furtherance of an enterprise, which he had conceived. He had discovered

a process by which rags were to be converted into wool, had patented this process as he represented, and was sure large and remunerative returns were in store for any one who had the sagacity and the nerve to embark in the venture. Ozanne was to share all the profits. Having obtained all he could from Ozanne, Collins came to New Orleans and was even more successful with the defendant Haber, who had become so captivated with the scheme that he had invested about four thousand dollars in the purchase of machinery for a factory to put the patent to practicable use. The invention was a chemical process by which rags were to be reduced to, or converted into wool by dissolving the vegetable fibre, and leave the animal fibre intact. This is the description of one of the witnesses.

When Ozanne, the plaintiff, came to New Orleans to get Collins and carry him back to Mississippi under the Governor's requisition, he found the defendant Haber in the full tide of successful experiment with Collins' patent. Haber was not willing that the inventor should be taken away from the field of his labour thus summarily. The result was that Haber gave to Ozanne the notes now in suit, the notes having been drawn by Collins in favour of Haber, and by him endorsed, upon Ozanne's transferring to him all his interest in Collins' discovery, and agreeing to dismiss the criminal proceedings against Collins, and leave him here. This is the agreement that is referred to at the end of each note.

This agreement recites that for and in consideration of these notes, Ozanne transfers all his interest in the contract with Collins to Haber, and agrees to dismiss the criminal proceedings at his own expense, and adds; "I, by these presents, voluntarily and freely withdraw all the criminal charges made by me against said Collins for obtaining money under false pretenses, the amount of money obtained having been secured to me by one A. Haber."

We do not think we can enforce this agreement, or give judgment on the notes which form its consideration. Story says a promissory note will be void if the consideration is, in whole or in part, illegal. It may be illegal either because it is against the principles and doctrines of the common law, or because it is specially prohibited by statute. The former illegality exists wherever the consideration is founded upon a transaction against sound morals, public policy, public rights, or public interests, as for example contracts of any sort made with an alien enemy; contracts in general restraint of trade or marriage; contracts for the perpetration, or concealment, or compounding of some crime. Prom. Notes, § 187.

Another writer is to the same effect thus;—Considerations impeding the course of public justice, as dropping a criminal prosecution for a felony, or a public misdemeanor, or suppressing evidence, are illegal

considerations. Byles on Bills, 218. The principle is well established, and is constantly applied.

The plaintiff, having made an imprudent venture, found himself deceived, and his money gone, and for the purpose of getting it back, resorted to criminal proceedings, which he hoped would extort it from the man who had played upon his credulity. Finding the defendant in the meshes, from which he was endeavoring to extricate himself, he availed himself in turn of the defendant's delusion, and took his notes to reimburse himself, promising to release the criminal as a consideration therefor.

The lower court thought he was not entitled to recover upon notes given for such a purpose, and so think we.

Judgment affirmed.

No. 5714.

OSCAR ALLEN VS. THE MERCHANTS' MUTUAL INSURANCE COMPANY.

Where in a contract of insurance which covers a storehouse, and the goods therein, it is stipulated that should the assured subsequently take out a policy in any other company, the assurers should receive notice of it on pain of forfeiting their policy, a subsequent assurance of the house, or the goods, in another company, without notice to the assurers, will work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

Isaiah Tharp for plaintiff and appellee.

A. & W. Voorhies and *Hornor & Benedict* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. This is an action upon a policy of insurance against fire. The claim is for six thousand dollars on a stock of furniture in the frame slated store on the corner of Magazine and Sixth streets, and one thousand dollars on furniture in a frame slated warehouse in its rear.

The defendant pleads in bar of recovery, that the policy is vitiated by the violation of that clause requiring written notice to be given it of insurance in other companies, and avers that the plaintiff insured the same property in the Lafayette insurance company, and failed to give notice thereof to the defendant.

The policy contains this clause; "And provided further, that in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and

mentioned in or endorsed upon this policy, then this insurance shall be void, and of no effect, and if the said insured or his assignees shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no effect."

The policy is dated Nov. 22, 1871 and was renewed every year to the same date 1874. On February 13, 1874 the plaintiff assigned his right in the policy to Mrs. Balser to the extent of $1,180. which the company approved, and the suit is to recover her interest as well as the plaintiff's. On July 18, 1874 the plaintiff insured in the Lafayette company for two months for two thousand dollars, and the property is described in that policy as "stock of ready-made furniture contained in the two-story frame slated building situate on southeast corner of Magazine and Sixth streets."

The law upon the vitiation of a policy of insurance for non-compliance with the condition quoted above is well settled. The elementary writers are in accord upon it, and the point has been several times adjudicated by this court. 1 Phill. Insurance, 420. Walton v. La. Ins. Co., 2 Rob. 563. Battaille vs. Merch. Ins. Co. 3 Rob. 384. Leavitt v. West. Ins. Co. 7 Rob. 351.

It was attempted to be proved that the plaintiff did not know of this provision in the policy, but he ought to have known it. He had the opportunity to know it. The clause is printed like other parts of the policy, and his negligence in not reading it is the only cause of his ignorance of its stringent provision. He agreed on his part to comply with that stipulation as fully as he agreed to pay the premium, and is now barred from recovery for failure to do so. When he calls upon a court to compel the company to fulfill its part of the obligation, he must show that he has fulfilled all the conditions into which he entered.

The plaintiff insists that the rule of vitiation of policy for want of notice of other insurance does not apply here, because he had brought suit against the Lafayette company without success (for misdescription of policy), and as that contract cannot be enforced, it should not constitute a breach of the one he is now trying to enforce. But the clause of the policy set up against him is, not that if he should attempt to make an enforceable contract with other insurance companies and should fail in doing so, that his contract with the defendant should be at an end, but it forbade him to insure elsewhere absolutely without giving notice, and obtaining consent.

He also urges that there were two separate risks, one on the furniture in the corner store, and the other on that in the warehouse, and his insurance in the Lafayette company was on one only of these, and can

not therefore affect the other. There was but one policy issued by the defendant, and the stipulation covering subsequent insurance applied to the property as a whole, and that was that the insurance then effected should not be good if the plaintiff afterward effected any other "on the property hereby insured."

We are not disposed to think the plaintiff has acted fraudulently. His insured stock is proved to have been worth much more than the amount of his insurance. Like Leavitt's case in 7 Rob. it is one of hardship, but the plaintiff can only blame himself that he did not inform himself fully of all the conditions of the policy. The clause in question is one of the most usual conditions of insurance policies, or rather it is inserted in all of them.

There is error in the judgment of the lower court, and therefore it is ordered, adjudged, and decreed that that judgment is avoided, and reversed, and that there be now judgment in favor of the defendant against the plaintiff upon his demand, and for costs.

No. 7116.

JOHN BLASINI ET AL. VS. SUCCESSION OF SILVESTRE BLASINI.

A suit by forced heirs against those in possession of the property of the succession, claiming to be owners under an executed will, instituted to annul the whole or part of the will, is properly brought in the probate court in which the will was admitted to probate and executed.

Where a man introduces a woman to his friends as his wife, calls her his wife, and he and she live together publicly as man and wife until her death, and their children, born while they are thus living together, are baptized, reared and educated as their legal offspring, the law will presume that they had been lawfully married, and that their children are legitimate, until it is shown that no marriage between them ever took place, or that it was void on account of some nullity established by law.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Labatt & Clinton and *Jules Buisson* for plaintiffs and appellees.

Paul E. Théard for defendant and appellant.

The opinion of the court was delivered by

MARR, J. Silvestre Blasini died at his domicile, in New Orleans, in July, 1876. A few days after his widow, Emilie Charlotte de Tily, caused to be probated his will, made in 1859, by which she was appointed executrix, with usufruct for life, or during widowhood, of the entire property of the succession; and her son, Silvestre Blasini, Jr., sole issue of the marriage, was constituted univeral legatee.

By judgment of the twenty-fourth July, 1876, Widow Blasini was

decreed to be entitled, in absolute ownership, as survivor of the community, to one half the property of the succession, and to the usufruct of the other half; and her son, Silvestre, was recognized as sole heir and owner of the other half, subject to the usufruct of his mother. They were sent into possession, under their respective claims and titles; and the succession was thus closed.

In September, 1876, this suit was brought by John Blasini, Joseph Blasini, and Loretto Blasini, claiming to be forced heirs of Silvestre Blasini, issue of his marriage with Isabella Barera, his first wife, who died in 1849. They demanded the nullity of the will, so far as it deprived them of their *légitime;* and they caused the Widow Blasini and her son Silvestre to be cited as defendants.

Defendants answered by general denial; and they specially denied that plaintiffs were legitimate children of Silvestre Blasini.

On the first trial the demand of the plaintiffs was rejected; but a new trial was granted; and the district judge, after an exhaustive review of the testimony, concluded in favor of plaintiffs, awarding to them, each, one fourth of the succession. There was again a motion for new trial; whereupon plaintiffs filed a *remittitur*, restricting the judgment in their favor to one fourth each, after deducting the one third which the testator was legally entitled to dispose of to their prejudice. Considering this *remittitur*, which corrected the manifest error of the judge, the new trial was refused; and the defendants appealed.

In this court appellants have filed a peremptory exception that, as the succession was closed by the judgment of twenty-fourth July, 1876, sending the widow and testamentary heir into possession, no suit could afterward be brought against the succession. If the suit had been brought against the widow alone, in her capacity as executrix, it could not have been maintained; but it was brought against the persons in possession claiming to be owners under the executed will. It was brought by the proper parties against the proper parties, and in the proper court. A suit by forced heirs for recognition and to annul, in whole or in part, a testamentary disposition, is of probate jurisdiction; and it falls within the cognizance of the court in which the will has been admitted to probate and has been executed.

There were several bills of exception taken, touching which it suffices to say that the objections went to the effect; and that all the testimony offered and received was pertinent to the only issue in the cause, the legitimacy of the plaintiffs.

An immense mass of testimony was taken on the trial, which it is not necessary to discuss separately and in detail. We shall state the material facts, as we consider them proven, and our views of the law applicable to them.

Silvestre Blasini, a Corsican by birth, in early life a sailor, came to New Orleans in 1833, or 1834, when he was about twenty-five years of age. He pursued different avocations; and made one or more voyages to Mexico and the islands of the Gulf; but he finally established himself permanently in business as the keeper of an oyster saloon and coffee-house.

About 1835 he was living with a very young woman, a Mexican, of dark complexion, whom he introduced to his friends and acquaintances as his wife, whom he said he had married in Mexico, whose name was Isabella Barera; and he continued to live with her publicly, introducing her as his wife, calling her his wife, until she died.

There were six children, issue of this connection, the first born in 1836, the last in 1848. Three of them died before their mother, and the survivors are the plaintiffs in this suit.

These children were reared in the house of their father and mother; and they were treated, cared for, and educated in all respects as their legitimate offspring. They were sent to schools of the highest respectability; they associated and played with children of their own age, of respectable parentage, living in the same vicinity, without any question as to their legitimacy; and the father caused a marble slab, with inscriptions, to be placed over the vault in which were buried two daughters, one born in 1836 the other in 1838, of whom the latter died in March, 1849, about two months before their mother. It will hereafter appear why the inscriptions on this slab were not produced in evidence.

On one occasion Blasini gave a dinner at his own house, on the anniversary of his marriage; and when he and the guests, probably, had drank too freely, he resented some supposed or real indignity to his wife by a violent blow, for which he was arrested.

On another occasion, when one of the witnesses, a woman, asked him where he got that "pretty little Mexican," as the phonographer reports it, or "mulattress," as one of the counsel, or "maitresse," as the other counsel understood the witness, Blasini answered promptly: "You are mistaken; that is my wife." "What church were you married in?" "In Mexico," he said. She immediately apologized; and he said it was all right; but that she was his wife. This witness went to Blasini, as she says, merely to gossip. It is evident that the dark complexion of Isabella had impressed the witness with the idea that she was colored, and, therefore, could not be the wife of Blasini; and licensed her, as she supposed, to speak thus slightly of her. The "pretty little Mexican," with whom the witness was not then acquainted, was in sight, but not within hearing. Blasini afterward introduced her to witness as his wife; and when witness told her, as a joke, what had passed between herself and Blasini, she told witness she was married.

On one occasion when one of the friends of Blasini censured him, out of the presence of Isabella, for his ill-conduct to his wife, he says Blasini told him she was not his wife.

On another occasion, a colored woman, who is rich enough to live off the earnings of the past, who did not hesitate to say that she was a concubine, and had been living in that condition for thirty-five years, testifies that she went to Blasini's, as she was in the habit of doing, to buy fish or oysters. She says she found Isabella in a corner of the room, crying, as she told witness, because of the ill-treatment of Blasini. Witness asked why she allowed him to treat her in that way; and she said, "because he has got the upper hand of me. I am not married to him, and that is the reason he treats me so." She thinks this was about 1848; and she says, on cross-examination: "I did not talk to her before that, or after that, about any thing."

On another occasion, as one of the female witnesses says, Blasini visited witness and her husband, at their home, and introduced witness and her husband to Isabella as his wife. She and Isabella immediately entered into conversation, sitting on a sofa, apart from the men; and she heard Blasini say to her husband, he was living with Isabella and having children by her, but that he was not married to her. Why not? Because it is a delicate thing; but she is colored, and I can't marry her. Subsequently, Blasini came and told her husband Isabella was sick; and her husband, at the request of Blasini, sent her to see Isabella. Witness found her in bed, and in tears. In answer to her inquiry as to what was the matter, Isabella said: "I am grieved to think I am not married with Mr. Silvestre." Witness went no more, and never saw Isabella again, because it was not an honest house!

The whole story is very improbable. The first time witness saw Isabella was when she and Blasini made a friendly visit, and Blasini, presenting Isabella to herself and her husband, said: "I introduce you my wife;" and soon after she heard him telling her husband he was not married to her because she was colored, which, if it had been true, would have made their marriage legally impossible, and the visit an insult. After that, neither witness nor her husband had any thing to learn as to the social relations of Blasini and Isabella. The second and last time she saw Isabella was when her husband sent her, at the request of Blasini, to visit, according to her, his colored concubine, whom she found in bed, sick with grief because she was not married to the man with whom she was living, who made friendly visits with her, who introduced her as his wife; and by whom she had three children living. Her husband did not want her to visit Isabella again, because it was not an honest house, which, if it had been the fact, she and her husband knew just as well from the beginning of their acquaintance with Isabella as they could

have known it afterward. The statement which she says Isabella made to her was precisely what her womanly, motherly instincts would have prompted her to keep as a sacred secret. Certainly she would not have been so ready to reveal to a stranger a fact which caused her so much distress and suffering, which would have made her an avowed concubine, and would have marked her children visibly with the ineffaceable stain of bastardy. This witness is the only one who pretends that Blasini ever said that Isabella was a colored woman; and the evidence proves conclusively that she was of Spanish origin, speaking Spanish as her mother tongue.

The story of the old colored concubine is equally improbable. She represents Isabella, with whom she never talked about any thing before or after that time, as unnecessarily and extraordinarily communicative; and she makes her assign as a reason for submitting to Blasini's ill-treatment, and for continuing to live with him, what would have been the very best reason for leaving him; and would have enabled her to break off at any time a burdensome connection, which marriage alone would have made obligatory and permanent.

No greater importance is due to the statement said to have been made by Blasini to his friend who censured him for his conduct to his wife. Under the influence of passion, or to excuse himself, or to escape further censure, Blasini might have said he was not married; but such a statement could not be permitted to belie the entire history of his public cohabitation.

On other occasions, as early as 1836, at different times, under different circumstances, to his best and most intimate friends, Blasini introduced Isabella as his wife; and he told them he had married her in Mexico. She bore his name, was called M'me Silvestre and M'me Blasini; and in conversation with others he called her his good wife, his angel. When she died he said to his best friend, Bofill, now dead, who superintended the funeral arrangements: "Tu iras enrégistrer la mort de ma femme." This was said in the hearing of a witness who gives his exact words, and who saw Bofill leave to do this service. In the proper book, in the office of the Recorder of Births and Deaths, under date June 10, 1849, upon the declaration of Bofill to the Recorder, in the presence of two subscribing witnesses, her death was registered as having occurred on that day; and it is also stated that she was a native of Mexico, aged twenty-eight years, and that she was married to Silvestre Blasini, "her surviving consort." The use of the pronoun "tu" by Blasini in his instructions to Bofill proves the intimacy of their relations, which is otherwise abundantly established; and he must have learned from Blasini the particulars embodied in the mortuary registry.

On the twenty-second September, 1849, about three months after the

death of Isabella, Blasini married Emilie Charlotte de Tily. When asked why he had married again, he said he wanted somebody to take care of his children. They were the three plaintiffs in this suit, the eldest ten, the next four years of age, the youngest about eighteen months old. These children were presented to the newly-married wife by her husband, their father, as his children. They continued to be members of his household; and they were cared for and treated with uniform kindness by their stepmother, as one of them acknowledges and testifies. When Silvestre, Jr., sole issue of this marriage, was baptized, John, the oldest son of the first bed, was his godfather; and it may be added, though out of the chronological order, that when Charles Louis, son of John Blasini, was baptized, in October, 1873, Silvestre, Jr., was his godfather.

From the records of the church copies were produced, showing that John was baptized on the fifteenth July, 1839, as the son of Silvestre Blasini and Elizabeth Barera; and that Joseph Marie was baptized on the thirtieth June, 1842. This record is remarkable, because it must be presumed that the officiating priest learns from the father and the mother the particulars which he embodies in the registry of baptism:

"Le 30 Juin, 1842, a été baptisé Joseph Marie Blasini, né le quatre Juin, 1842, enfant légitime de Sylvestre Blasini et Da. Isabella Barera, son épouse."

Why did the priest, writing in the French language, prefix to the name of the mother the title appropriate to a Spanish or Italian wife? How dared he style the child presented for baptism "enfant légitime," upon any other hypothesis than that he received from the parents, at the time he performed the ceremony, the particulars of which he made permanent record?

Equally remarkable is the registry of the death of Rosa, in which she is described as the legitimate daughter of Mr. Sylvestre Blasini and of Mrs. Blasini. True, this registry was made upon the declaration of Déjoux, a near neighbor of Blasini; but it is not to be presumed that he would officiously, without the request, or at least the knowledge and consent of the parents, have taken the trouble and incurred the expense of having this registry made, which could by no possibility have benefited him.

If these records serve no other purpose, they show beyond controversy that the parents of these children were publicly reputed to be husband and wife; that they publicly assumed to be husband and wife in the most solemn acts of social life; and that, with their knowledge and consent, their offspring were publicly reputed to be their legitimate children.

There were two daughters, Félicite Carmen, or Carmélite, as the

witnesses call her, and Apolina Rose, or Rosa, as she was called, the first born in 1836, the last in 1838. There is no proof fixing the period of the death of Carmélite; but the proof is abundant that Rosa died but a short time before her mother, in the same year. They were both buried in the same vault, belonging to their father, in which he was afterward buried. Several years after the death of Rosa, the testimony is some time before the war, Blasini employed a marble-cutter to place a slab on the vault, with inscriptions prepared according to his instructions. Within a short time, probably less than a month after the death of Blasini, the same cutter called on Widow Blasini to contract for putting a new slab on the vault. The widow, Silvestre, Jr., and his wife were present at this interview, and there was some conversation as to what should be done with the old slab, commemorative of the two girls. The cutter suggested that it might be broken, and used about the new work. It was finally agreed that this should be done; and now nothing remains to show what these inscriptions were, which testified to the father's love for the first fruits of his cohabitation with their mother.

A memorandum-book, which seems to have been used by Blasini, for his private affairs, was introduced in evidence, and comes up in original. The earliest date seems to be 1863; and the entries are not in chronological order. It is written for the most part in Italian, though there are entries in English and in French by different hands. Some of the writing was done by Silvestre, Jr.; and all that is in Italian does not seem to be by the same hand, though the greater part is. Most of the writing relates to business matters. One on the last leaf, purporting to be by Blasini, dated fourth March, 1863, states that Loretto, whom the writer calls "Il mio raggazzo," my boy, commenced work on that day for Bernard. About thirty pages from the end, after an entry of July 11, 1868, is a memorandum that "Il mio figlio Silvestre" had engaged to work by the month, beginning on the second November, 1873. On the reverse of the front back of the book is a memorandum that "Il mio figlio Loret" arrived from Brazil on the sixth January, 1873; and at the foot of the same page it is related that Joseph commenced work by the month, beginning on the seventh October, 1868. About forty pages from the beginning, immediately following an entry of June 2, 1868, is a memorandum that John arrived from New York, with his wife, on the fifteenth August, 1873, and that they left for Galveston on the twenty-eighth of the same month. The proof shows that they spent the intervening fortnight at the house of Blasini, where they were received and treated as members of the family. About a dozen pages further on, following entries of October and November, 1869, on the same page, it is stated that Loretto left for New York, by steamer, on the seventeenth May, 1873.

Insignificant as these entries might otherwise be, they afford important and unmistakable evidence of the affectionate fatherly interest which Blasini continued to take in these his children, and of his continued, avowed recognition of them as his sons, for more than twenty years after the death of their mother.

After an entry of August, 1869, near the middle of the book, are several blank pages, followed by a business memorandum of fifth January, 1867, or 1869, the last figure is not distinct. Then follows, on three consecutive pages, a statement, in Italian, said to be in the handwriting of Blasini, which purports to be the pedigree of all his children, beginning with the first, a daughter born in 1836, and ending with Silvestre, born in 1852. The writing immediately following this is dated second September, 1869. It is in different ink; and it affords no clue to the date of the pedigree. The uniformity of the writing indicates that it was all done at one sitting; and the freshness and color of the ink show that it is of recent date.

This statement is divided into as many paragraphs as there were children. Each separate paragraph relates to one child; and each purports to be signed by Silvestre Blasini, except the third and fifth. The statement is minute. It gives the day of the month and the year of the birth, the name of the mother, the name of the child, the name of Silvestre Blasini as the father, his birthplace, the names of his father and mother, the nativity of the mother described to be "del isola di Mesicho;" and the names of the godfathers and godmothers of all except Rose, stated to have died the day after her birth, and Silvestre. It mentions the date of the baptism of one, and the church at which another one was baptized. It applies the words "figlia di me Silvestre Blasini i di Isabell Barera" to the daughter Rose; and the words "figlio di me Silvestre Blasini i sua matre Isabell Barera" to each one of her sons; and it adds the surname Blasini to the baptismal names of two of them.

The statement with respect to Silvestre is equally minute, except that no mention is made of his baptism. Perhaps the omission was accidental; perhaps the writer did not care to say that John Blasini was the godfather. It uses the words legitimate three times: once with respect to the mother, styled "mia sposa legitima": once with respect to the son, styled "figlio legitimo di me;" and once with respect to the father, "patre legitimo del mio figlio."

It is manifest that this writing was not contemporaneous with the events to which it relates; and that the writer's memory was at fault in several particulars. Rose, the second child, is stated to have died on the twenty-fourth July, 1838. Independently of the official registry of her death, the proof is ample that she died in 1849. The date of the baptism of John is stated to be the eighth of July, 1839; whereas, the

records of the church show that he was baptized on the fifteenth July.

There were two boys, named Joseph, or Gioseppe, one Gioseppe Maria, born fourth June, 1842, died fourth July, 1842. After minute details of his birth, parentage, and death, the words "figlio naturalle" have been written between the date of the death and the signature, on the same line. These words seem to have been an afterthought. They evidently occurred to the mind of the writer after the paragraph was completed, apparently after the signature was written. If they had expressed the truth, their proper place would have been in the body of the paragraph, where the words "figlio di me" are written. This same Joseph Maria is styled in the registry of baptism, in the archives of the church, "enfant légitime de Sylvestre Blasini et de Da. Isabella Barera, son épouse." This registry is contemporaneous history; and it can not be destroyed by the application to this child, more than twenty years after his death, of the words "figlio naturalle." It is strange that the writer selected this dead child of the six children of the same bed, and applied these words to him alone. It is equally remarkable that these words should have been falsified in advance by the registry of his baptism, on the thirtieth June, 1842, five days before his death.

With respect to Loretto, the last child of the first bed, born in 1848, the writer could not recall the date of his birth: so, at the head of the paragraph relating to him he gives the date "alli 13, o 18, o 20 del Mese di Genaro." That is, when he was writing this paragraph he did not know whether this child was born on the thirteenth, or the eighteenth, or the twentieth of the month. Was it the father of the child who was thus forgetful? Would the father have set down deliberately, with the honest intention of writing a true and faithful pedigree of his children, without first having assured himself of all the particulars, and refreshing his memory when he found it defective?

The evidence shows that John Blasini was a wild boy; and as he approached manhood he gave his father great trouble, caused him much expense, and incurred his serious displeasure. About this time, influenced by his partiality for Silvestre, and to some extent by his feelings toward John and his brothers, all of whom he characterized as bad boys, according to the witnesses, Blasini determined to dispose of his entire property to their exclusion. Accordingly, in 1859, he made his last and only will, in which there is no reference to a former marriage, nor to any offspring except Silvestre, whom he describes, not as his only child, but as the only child of his marriage with Emilie Charlotte de Tily. The language of the will is: "Je suis marié à dame Emilie Charlotte de Tily, et n'ai qu'un enfant de mon dit mariage, nommé Sylvestre Blasini."

He did not, at any time, inform the children of Isabella that there

was any question of their legitimacy; but he did tell Dr. Lemonnier, and other respectable persons, after the birth of Silvestre, that he had not married Isabella, and that his children by her were illegitimate. He knew that his will could not be maintained if his children by her were held to be legitimate; and his disparaging and unnatural statements, perhaps the use of the words "figlio naturalle" in his memorandum-book, with respect to the dead child, and the superabundant use of the word legitimate in the pedigree of Silvestre, may be attributable to the settled determination to have the will maintained for the benefit of Silvestre, on whom his father relied, as he told one of the witnesses, to support the honor of his name and family.

By our law, marriage is a civil contract. The most important of all contracts, it is meet, it is decent, that it should be celebrated with such publicity and with such solemnities as would leave no defect of proof that the parties were able to contract, that they were willing to contract, that they actually did contract. The presence of the civil magistrate or the minister of religion, and of kindred and friends, is eminently proper; and the license gives assurance of the absence of all legal obstacles. But the law does not require written evidence of the marriage, nor the testimony of those who were present and witnessed the ceremony; nor does it avoid the contract for want of a license.

In many cases it would be a cruelty to require positive proof of actual marriage. Especially would this be unreasonable and oppressive where, as in this case, the reputed marriage is said to have taken place in a foreign land: where both the parties are dead; and where their offspring, about whose actual filiation and descent there never was the vestige of a doubt, do not know in what part of that foreign land the marriage may have been solemnized.

The law will not tolerate the presumption that a man and a woman who live together, publicly, as husband and wife, are really living in concubinage in violation of the law and of public decency. From certain established facts certain legal presumptions are deduced; and where it is proven, as in this case, that the parties from the time of their first appearing together in the community in which they made their permanent domicile, publicly cohabited, assuming to be husband and wife, without separation or interruption until death intervened: that the woman bore the man's name, and he called her his wife, and introduced her as his wife, and declared that he had married her in the land of her birth: where they present their offspring to the world as their children, give them the surname of the father, have them baptized as their children, and rear, and care for, and educate them as such, the law accords to the man and the woman and to their children a legal and social status, based upon the presumption of marriage, the consequence of which is

the presumption of legitimate filiation and descent, which imposes on those who assert the contrary the burden of destroying that presumption. It is not going too far to say that the entire conduct of Blasini and Isabella created, in favor of their children, a presumption of legitimate descent, which could be destroyed only by proof that they were not actually married, or that there was some legal impediment by reason of which their marriage was legally impossible.

This presumption does not sanction voluntary cohabitation, nor elevate concubinage, of whatever duration, to the dignity of marriage. When it is said that marriage may be proven by reputation, the meaning is that the acts and conduct of the parties, as established by satisfactory proof, authorize and create the presumption that they were actually married, with all the formalities required to constitute a valid marriage by the law of the place at which it is reputed to have been solemnized: and this presumption is such that it yields only to proof that there was no such marriage, or that it was void because of some nullity established by law.

If a man or woman so circumstanced, to gratify some whim or caprice, or to accomplish some settled purpose, should deny the reputed marriage, a moral estoppel would intervene, and forbid the falsifying of their acts and conduct by such denial.

During the entire cohabitation of Blasini and Isabella they were apparently living in the observance of the obligations of the contract of marriage; and their acts and conduct are not compatible with any other theory than that they were actually married, in Mexico, before Isabella came to New Orleans. We must, therefore, regard the plaintiffs as their legitimate children, and forced heirs of their father, Silvestre Blasini. As such, they are entitled to participate equally with their paternal brother, Silvestre Blasini, Jr., in that portion of the succession of their father, the two thirds, which he was forbidden by law to dispose of by will to their prejudice.

That part of the judgment of the district court which awarded to Widow Blasini the one half is not before us for review. Upon the hypothesis that it is correct, the other half constitutes the succession of Silvestre Blasini. Whatever the succession of Silvestre Blasini may be, Silvestre Blasini, Jr., is entitled to one third of it, under and subject to the conditions of the will. The remaining two thirds will be divided equally between the three plaintiffs and Silvestre, giving to each one fourth of these two thirds. This is the extent and effect of the judgment of the district court, as restricted by the *remittitur* and the judgment refusing a new trial, and no amendment is necessary.

The judgment appealed from is therefore affirmed with costs.

Rehearing refused.

No. 7216.

PHILIP WERLEIN VS. MERCHANTS' MUTUAL INSURANCE COMPANY.

Where the value of a certain piece of property, specifically insured for that value, is less than $500, this court is without jurisdiction of a suit to recover the value, even though the property was insured under a general policy which embraced other objects aggregating in value much more than $500.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Merrick, Race & Foster for plaintiff and appellee.

A. & W. Voorhies for defendant and appellant.

The opinion of the court was delivered by

MARR, J. Philip Werlein brought suit against M. E. Wheyland to recover $345, with interest, being balance due for a piano; and by sequestration and attachment and garnishment, he caused to be seized, in the hands of the Merchants' Mutual Insurance Company "the insurance money of a certain piano upon which plaintiff had a vendor's lien and privilege amounting to $345, interest, etc.," which piano, it was alleged, was insured by the company for $400, and was lost by fire.

The company in answer to interrogatories denied indebtedness to the defendant; and exhibited a policy in her name, on household furniture, for $1800; on a piano for $400; on a sewing-machine for $50; and on two mirrors for $75 each, in all $2400.

The suit resulted in a judgment in favor of plaintiff for $345, with legal interest from seventh July, 1874, till paid, and costs of suit, with privilege on the property attached and sequestered. The plaintiff then took a rule on the garnishee, the Merchants' Mutual Insurance Company, to show cause why the $400, amount of insurance money on the piano, should not be deposited in court, and judgment rendered against the company as garnishees for the amount of the debt, interest, and costs. The district judge decided that the rule to show cause was not the proper proceeding to determine the liability of a garnishee whose answers deny liability; and he dismissed the rule, reserving to plaintiff the right to proceed otherwise, and according to law, against the company.

Thereupon this suit was brought by Werlein against the Merchants' Mutual Insurance Company to recover the amount of the judgment in his favor against Wheyland. From the judgment in favor of plaintiff the company appealed; and plaintiff, appellee, now moves to dismiss the appeal for want of jurisdiction, because the amount in dispute is less than $500.

There is no question here about the correctness and finality of the judgment against Wheyland; nor is there any dispute as to the fact

that the amount of the judgment against the company, including interest and costs, is less than $500; but the company, appellant, maintains that the contract of insurance is indivisible, for the whole amount, $2400; and that the matter in dispute is the liability of the company on this entire contract.

The evidence does not support this theory. Under this policy there was separate insurance on household furniture, not otherwise designated; on the piano, on the sewing-machine, and on the mirrors, at separate valuations, the whole aggregating the amount insured, $2400. Now, all the household furniture might have been saved, and the piano and other articles might have been lost: or all might have been saved except the piano. So far as Werlein is concerned, he had seized in the original suit, by attachment and sequestration, nothing more, nothing less, than the insurance money on the piano, valued at $400; and the judgment gave him a privilege on nothing more, nothing less, than the $400 insurance money on the piano.

The basis of the present suit is the liability of the company, by reason of the judgment in the original suit, with privilege on the $400 insurance money on the piano; and although it may be true that the same causes which would make the company liable for the loss of the piano would make it liable for the loss of all the other property covered by the policy, Werlein had nothing to do with the liability of the company for any thing more, nor for any thing less, than the $400 insured on the piano specifically.

In defending this suit, the company might have alleged causes which would have exonerated it from liability for any loss whatever under the policy; but there could have been no judgment in this suit which would have been conclusive in favor of the company or against the company upon any other question or issue than liability for the loss of the piano. If the district court had determined that the company was not liable, for any cause, for the loss of the piano, that judgment would have been *res adjudicata* against Werlein: but it would not have concluded the assured, if she had brought suit on the policy to recover for the loss of the other property insured.

It frequently happens that the debtor, of whom his creditor claims a large amount, is garnisheed for a small part only of that amount: and that, if he is liable for the small amount seized in his hands, he would be liable for the whole amount claimed under the same contract or dealing; but this is no obstacle to the enforcement, by garnishment, of liability for the smaller amount; nor are any parties concluded by the judgment on the garnishment except the parties to the suit, to the extent of the demand.

The amount in dispute, so far as they are concerned, is the debt

which the seizing creditor seeks to enforce against the seized debtor; and whether the appellate tribunal would have jurisdiction of the controversy is a question wholly dependent upon the amount which the garnishee could be compelled to pay upon the judgment.

It may be very inconvenient for the insurance company in this case, it may be inconvenient for garnishees in many cases, to litigate with different persons the question of liability for portions of a larger alleged indebtedness; but, after all, such inconvenience determines nothing with respect to the amount in dispute in any such case; and the only criterion is: What amount would discharge the liability which the seizing creditor seeks to enforce against the garnishee? If the answer be, a sum exceeding $500, that is the amount in dispute; and appellate jurisdiction attaches; if the answer be, a sum less than $500, that is the amount in dispute; and appellate jurisdiction does not attach.

The amount in dispute in this case is the sum of money which Philip Werlein demands of the Merchants' Mutual Insurance Company. That dispute is exclusively between Philip Werlein and the insurance company; and as the amount demanded is confessedly less than $500, this court is without jurisdiction.

The motion, therefore, must prevail; and the appeal is dismissed with costs.

No. 6823.

E. B. BENTON vs. T. C. MAHAN ET AL. CHISM & BOYD, INTERVENORS.

Money and goods advanced by a factor to a planter and used in paying the laborers who make the crop constitute privileged debts on the crop.

Disbursements made through the sheriffs by order of court, to gather, manufacture and ship the crops on a plantation in the keeping of the sheriff, are debts incurred for the preservation of the crops, and therefore privileged.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

T. A. Bartlette for plaintiff and appellant.

Singleton & Browne for intervenors and appellees.

The opinion of the court was delivered by

SPENCER, J. Thomas Ong having a lease of a sugar plantation in St. Bernard, applied to Chism & Boyd, commission merchants of New Orleans, for advances to enable him to make, gather, and manufacture his crop for year 1876. Chism & Boyd agreed to advance in money, goods, and necessary supplies for that purpose to amount of $7700, including interest, commissions, etc. A formal contract was drawn and signed by the parties, in which Ong granted, in addition to the privilege existing by law, a special pawn and pledge on the crops, under the pro-

visions of act No. 66 of 1874. This act of pledge was passed April 27, 1876, and duly recorded. On 21st June, 1876, the sheriff under execution in Benton vs. Mahan, seized all the rights of Ong in and to said lease, growing crop, stock, implements, etc. At this time Chism & Boyd had advanced Ong nearly $5000 in money, goods, etc.

Ong enjoined the sale under said writ, and Chism & Boyd continued to advance money, goods, and supplies for carrying on the place.

We find in the record an admission that Chism & Boyd's "disbursements made to Thos. Ong, the defendant in execution, for the purpose of making the crops, did, on the fourth of December, 1876, amount to the sum of..... $14,082 04

That Chism & Boyd paid upon the order of the sheriff, expenses incurred in making the crop, the sum of..... 9,856 23

That the balance due Chism & Boyd on the rent claim transferred to them by the lessor of Thomas Ong, to whose liens and privileges they were subrogated, amounted to the sum of..... 3,441 55

That the costs of court amount to..... 416 55

$27,796 37"

It seems that on twenty-third December, 1876, an order was rendered by the court directing and authorizing Chism & Boyd to make such advances to the sheriff as would enable him to take off the crop, and ordering the crop to be shipped to them for sale—proceeds to be held subject to further order of court. It is, as shown above, admitted that under this order they advanced $9856 23. The crops were received and sold by Chism & Boyd, and realized $20,894 63. The controversy before us is over the distribution of these proceeds.

Under the written admission of the parties above quoted, we see but little room for controversy.

It is admitted that Chism & Boyd up to fourth December advanced for the purpose of making the crop $14,082 04. They had bound themselves to advance up to $7700, and very naturally sought to save themselves by further advances. It is unnecessary for us to decide whether they have a privilege for the excess of their advances over $7700. To that amount they were bound to advance, and to that amount they had beyond doubt a privilege under their contract. The evidence, aside from said admission, satisfies us that far more than $7700 of their said advances were actually used in making the crop. It matters not under the act of 1874 whether the advances were in money, goods, or provisions. If the money and goods advanced be used in paying laborers who make the crop, they are privileged under the act of 1874, as much so as provisions consumed by them.

As regards the disbursements through the sheriff, by order of court, to gather, manufacture, and ship the crops, they are expenses incurred for the preservation of the thing seized.

The claim of the lessor is also a privilege, as are the court costs.

Stating the account therefore on the above basis, we have—

Amount advanced and expended under the contract of pledge	$7,700 00
Amount disbursed by sheriff and paid by Chism & Boyd for gathering and making crops	9,856 23
Amount balance due lessor	3,441 55
Amount court costs	416 55
Making total of	$21,414 33

due Chism & Boyd.

We have seen that the proceeds of the crops amounted only to $20,894 63, a sum insufficient to pay the preferred claims of Chism & Boyd.

The judgment appealed from so decreed. It is correct, and is affirmed with costs.

Rehearing refused.

No. 6946.

PARISH OF PLAQUEMINES VS. JOHN BOWMAN.

The police jury of a parish have authority to impose any license tax they may see fit to impose on trading boats trading within the parish.

APPEAL from the Parish Court of Plaquemines. *O'Donnell*, J.

R. T. Beauregard, Parish Attorney, for plaintiff and appellee.

A. B. Phillips for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The only question presented to us is whether it is lawful and constitutional for the police jury of Plaquemines to lay and collect a license of $300 from the defendant who is engaged in running a "trading-boat" therein. It appears that the State license therefor is only $100. It is contended that the parish license can not exceed that sum.

Section 2743 R. S. provides that the police juries shall have power "to impose whatever parish tax they may see fit on all keepers of billiard-tables and grog-shops, and on all hawkers, peddlers, and trading boats."

We think it well settled that this provision is not in conflict with art. 118 of the constitution, which we have held does not prevent the Legislature from imposing different license taxes on different classes and occupations. City vs. Kauffman, 29 An. 283; State vs. Rolle, 30 An. 991.

Has said section been repealed or modified by subsequent legislation? The only provision restricting the police jury's power is found in act No. 17 of 1872, sec. 1, par. 91, and reads as follows:

"Nor shall the police jury of any parish levy a tax for any parish purposes, except to pay indebtedness incurred prior to the passage of this act, during any year, which shall exceed one hundred per centum of the State tax for that year, unless such excess, whether levied by village, city, or parochial authorities, shall first be sanctioned by a vote of the majority of the said voters of said village, city, or parish, at an election held for that purpose."

It is manifest, we think, that this act refers to the taxation of property, and not to the imposition of licenses on trades, occupations, and professions. But whether this be so or not, this general statute can not be held to repeal by implication the special and exceptional provision of sec. 2743 of the Revised Statutes, relative to keepers of "billiard-tables, grog-shops, peddlers, hawkers, and trading-boats." The Legislature of this State has for many years abandoned the government of this class of occupations to the discretion in great measure of the local municipal authorities. It has doubtless done so with a view to the better policeing thereof, and in the interest of the good order of society.

Whether it is wise, expedient, and just to thus subject classes of occupations to local control, is a question for the legislative department, and one with which courts have nothing to do.

We think the judgment appealed from is correct, and it is affirmed with costs.

Rehearing refused.

No. 5168.

CHARLES MADUEL, EXECUTOR, ET AL. VS. JULES TUYES ET AL.

An action of revendication of an immovable may be brought where the defendant resides, or where the property is situated.

A suit for the rents of the immovable involved in an action of revendication is properly brought where the property is situated.

A demand for the revendication of a certain property, and an alternative demand for its value, in case the defendants have incumbered it with obligations beyond its value, may be cumulated in the same suit.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

George L. Bright for plaintiffs and appellants.

Sambola & Ducros for defendant and appellee, Fernandez.

The opinion of the court was delivered by

DEBLANC, J. This suit was brought, in the Fifth District Court for

the parish of Orleans, by the executor of J. M. Caballero's will, and by Mrs. Conte, the daughter of said deceased, to recover from defendants who all reside in this city, except J. A. Fernandez y Loneros, whose domicil is admitted to be in the parish of St. Bernard, an improved lot of ground situated within the limits of New Orleans, the apparent title to which stands in the name of y Loneros, and is assailed in this suit as a simulation concocted by him and two of the other defendants.

To this extent, plaintiffs' action is one in revendication and could—at their choice—have been brought either in the parish of Orleans or that of St. Bernard. This is indisputable.

C. P. 163.

Of the plaintiffs' moneyed demands, the first—that for rents—is, in substance, one for damages, which Mrs. Conte conceives that she has suffered, on account of y Loneros' alleged trespass on the real estate which she claims by inheritance from Caballero, and those damages are fixed at an amount which she and the executor presumed to be equal to the revenues which the property would have yielded since she has been deprived of its possession. That demand was properly brought before the judge of the place where the revendicated property is situated.

C. P. 165, No. 8.

As to those revenues, their action is but an incident to the main action; the action to recover the property, and its branch—that to recover its revenues, are nearly as closely linked and germane to one another, as a demand for the principal of a debt and the interest which has accrued on that principal. In this instance, the incidental demand is—not only not contrary to nor exclusive of the main one—but arises from the very act which produces the latter.

The last of plaintiff's demands—that for the value of the property, in case it be ascertained that defendants—taking advantage of their concocted simulation—have so encumbered the property that its recovery in kind would amount to its loss—is not inconsistent with the others. They ask the property itself, as they allege it was before the simulation, free of incumbrances—or its value, if defendants have burdened it with rights which may be enforced against it and exceed its value.

These different demands could be and were properly cumulated.

15 A. 293—C. P. 7-151—4 A. 28—6 R. R. 468.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and this case remanded to the lower court, to be proceeded with according to the views herein expressed and according to law: the costs of this appeal to be paid by defendants.

INDEX.

ACCRETION.

See Legacies and Legatees.

ADMINISTRATORS.

The executor of a succession is liable in a fiduciary capacity for all succession funds received by him, or which come under his control; and he can not change the nature, or relax the stringency of his obligation for such funds, by wrongfully allowing them to be received by, or pass into the possession of a commercial firm, of which he is a member. *Succession of Bayly, 75.*

In a suit for the partition of real estate owned in part by the heirs of a succession, the executor of the succession has no legal power to represent either the heirs or the succession.

Boutté et al. vs. *Executors of Boutté, 177.*

An administrator of a succession who receives from his predecessor in office a certain sum of succession money, which the former administrator had collected, and taken his full commission from, is not entitled to commission on said sum, merely because he divides the money among those to whom it belongs. Such a division does not amount to a new administration of the money.

A second administrator, whether he be a public administrator or not, is not entitled to a commission on any asset of the succession, even though he may have collected it, if the asset appeared in the inventory of, and paid a commission to the former administrator.

Succession of François Bougère. On Opposition of Mrs. Amélie Richard, 422.

One administrator of a succession is not estopped by mistaken admissions in the pleadings of a suit made by a preceding administrator.

James Lusk vs. *Succession of W. M. Benton, 686.*

The bond of an administrator inures to the benefit of the heirs, as well as of the creditors of the deceased. *Goux* vs. *Moucla, 743.*

The executor of a foreign will is not permitted to exercise his office in Louisiana by virtue of his foreign appointment, but must first obtain the authority of the court here. *Succession of Butler, 887.*

While administrators and executors must sustain the charges set forth in their accounts, the kind and degree of proof vary according to other facts which may be proved, or which appear on the face of the papers. There is a presumption in favor of the correctness of an executor's account whose general management evinces fidelity and integrity. *Succession of Maria Bauman, 1138.*

AGENCY.

See Principal and Agent.

APPEAL.

The real issue between the parties to a suit, which has been formally passed on by the lower court, will not be considered on a motion to dismiss the appeal. It must be referred for decision to the trial of the case on the merits.

The filing of the transcript of appeal in the Supreme Court, (in a case wherein a contest for office is involved,) *nine* days after the judgment in the case was signed by the lower court, is within the legal delay.

No acquiescence in the judgment of the lower court made by one of the appellants, or his attorney, can prejudice the right of appeal of another appellant, who was not a party to the act of acquiescence.

Any interested person may bring up the record of an appeal from the lower court, and deposit it in the hands of the clerk of the Supreme Court.

State ex rel. Fred. Duffel, District Attorney pro tem., et al. vs. *Morris Marks*, 70.

Where two separate appeals from two separate decrees are granted on the prayer of one petition, and the appeal bond only refers to one of the decrees, the appeal from the decree not referred to in the bond will be dismissed.

One who has been improperly made a party to an appeal is not qualified to ask that the appeal be dismissed.

One who was not a party to the suit in the court below, can not be made a party appellee to it.

The widow and heirs of a decedent have a right to intervene and appeal from a judgment affecting the possession or title to real estate belonging to the succession, even when the executors of the decedent are parties to the judgment, and have appealed from it.

A party to a partition suit who has taken a devolutive appeal from the judgment ordering the sale of the property to effect the partition, can not, after the property has been sold, suspensively appeal from a decree of court ordering the sheriff to put the purchaser of the property into possession of it.

When all the appellees are actually cited, it does not matter that the petition for appeal does not set forth the names of them all.

When the order for a devolutive appeal, and appeal bond are filed within a year from the date of the judgment appealed from, the appeal will be maintained, although it appears that the citations of appellees were not served until after the expiration of the year.

Celina Boutté, Wife, etc., et al. vs. *Executors of François Boutté et al.*, 177.

APPEAL—*Continued.*

An appeal will not lie from an order of court granting an injunction on condition that the applicant furnish such bond as the court shall thereafter designate, when the appeal is taken before the amount of the bond is fixed. Such an appeal is premature.

The Jefferson & Lake Pontchartrain Railroad Company vs. *the City of New Orleans, 211.*

An appeal will not lie from an order of court made in execution of a previous judgment of that court.

A party condemned for a less sum than five hundred dollars can not appeal to this court, although it may appear that the property of defendant, seized in execution of the judgment against him, is worth more than $500.

The State ex rel. T. S. Elder vs. *the Judge of the Third District Court et al., 229.*

Where parties have been recognized by a formal decree of court as legatees of a succession, no appeal will lie from a subsequent judgment on a rule taken by them, or on the application of the executor, ordering him to sell property enough to pay the legacies.

State ex rel. Alice McCloskey et al. vs. *the Judge of the Third District Court, 233.*

When the judgment appealed from only involves a claim for damages of four hundred and fifty dollars, and the possession of property, the value of which possession is neither proved, nor alleged, this court is without jurisdiction.

Mrs. J. B. Ducoing, Administratrix, vs. *Joseph Billgery, 250.*

The bond for a suspensive appeal from a judgment which does not decree the payment of a certain sum of money, or the delivery of a movable, or immovable, need only be for an amount sufficient to pay costs.

The bond for a suspensive appeal from a judgment which orders the sheriff to put a party in possession of certain real estate, should be for a sum exceeding by one half the estimated value of the revenues of the property pending the appeal, and for whatever additional sum may seem necessary to cover injury or deterioration which may be caused to the property by the appellants during the time they may continue in possession.

State ex rel. Durand et al. vs. *the Parish Judge of St. Martin Parish, 282.*

A mandamus will issue to compel the judge of a lower court to grant an appeal from any interlocutory decree of the court which works an irreparable injury to the party praying for the appeal.

State ex rel. Julia A. Ventriss vs. *the Parish Judge of Iberville Parish, 207.*

APPEAL—*Continued.*

In a suspensive appeal from a judgment dissolving an injunction without damages, the amount of the appeal bond need only exceed by one half the *costs*, which the appellant was condemned by the judgment to pay.

State ex rel. Williamson vs. *Judge of the Fourteenth Judicial District, 314.*

The interlocutory decree of the lower court maintaining a provisional seizure may, on the general appeal of the case on the merits, be reviewed by this court. *Aurich* vs. *Wolf & Levi, 375.*

In order that this court may have a record before it, in those cases where appeals from a justice's court are allowed, it is the duty of the justice whose judgment has been appealed from, to make to this court a certified statement of all the facts of the case, and every thing on file in the suit.

State ex rel. Boutroue vs. *Judge of the Third District Court, 415.*

Where it appears that the petition for an appeal from a decree of court rendered in chambers was filed in open court, on the same day, and immediately after the decree was rendered, and in the presence of the counsel of plaintiff and defendant, it will be held that the appellee was sufficiently cited. *Brown* vs. *Brown, 506.*

Where the police jury of a parish join in an appeal from a judgment making peremptory a mandamus against the treasurer of the parish on account of alleged services rendered, and expenses incurred in behalf of the parish, no affidavit of interest is required of the police jury. The interest is patent on the face of the record.

State ex rel. John J. Barrow, Sheriff, et al. vs. *Charles L. Fisher, Treasurer, 514.*

The emancipation of a minor qualifies him to become a surety on an appeal bond. *Silas H. Cooper and Wife* vs. *Jno. T. Rhodes, 533.*

In a contest between a judgment creditor and a garnishee, the fact that there is no note of evidence, assignment of error, or agreed statement of facts, will not justify a dismissal of the appeal, when the record contains the answers of the garnishee to the interrogatories served on him, the allegation of the creditor himself of the existence of the writ of *fieri facias*, and other matters of proof, which though not specifically noted as evidence, yet taken together afford sufficient basis for an intelligent judgment.

Edward Meyer vs. *G. Deffarge. H. Mehnert, Garnishee, 548.*

The appellee has the right to require that the sureties on an appeal bond, who signed the bond *jointly*, shall all reside within the jurisdiction of the court whose judgment has been appealed from, when the respective sum for which each surety has bound himself must

APPEAL—*Continued.*

be computed, in order to make up the necessary amount of the bond.

State ex rel. Zuntz & Sporl vs. *the Judge of the Fifth District Court et al.*, 582.

The transcript of an appeal from an order of seizure and sale need not contain any of the proceedings on the injunction taken out to arrest the seizure and sale, since such proceedings could not be considered by this court on such an appeal.

Adam Dobel vs. *J. M. Delavallade. E. P. Delavallade, Assignee*, 604.

Where in a contest between a seizing judgment creditor and a third opponent for the proceeds of the seized property, amounting to more than a thousand dollars, the latter claims the whole proceeds, and the former only four hundred and seventy-three dollars of it, no appeal will lie to this court; because the amount really in dispute is only $473.

Picard & Weil vs. *J. J. Wade. S. B. Newman & Co., Third Opponents*, 623.

The plaintiff is entitled to a suspensive appeal from a judgment dissolving an injunction with damages, on giving a bond for a sum exceeding by one half the amount of the judgment for damages.

The surety on an injunction bond who has, in the decree dissolving the injunction, been condemned in damages *in solido* with his principal, can not be surety on the bond of the appeal from the decree.

Louis Bauer vs. *Lochte & Cordes and Sheriff*, 685.

Where a corporation entitled to certain exclusive privileges enjoins a defendant from further violating those privileges, alleging that defendant had already damaged them, by violating said privilege, to the extent of $200, and making affidavit that the amount in dispute, and the right claimed by them was over $500 exclusive of interest and cost, this court will have jurisdiction of an appeal taken in such a case.

Crescent City Live-Stock and Slaughter-House Company vs. *John Larrieux*, 798.

Where three separate questions, tending to one conclusion, arise in one and the same case, as for example in the settlement of a succession, and having been consolidated by consent of parties are passed on in three separate decrees, rendered simultaneously, these decrees may all be brought before this court in one single appeal.

In such a case one appeal bond is sufficient; and as appellants were not condemned by the lower court to pay any sum of money, or deliver any property, the bond need only be for an amount to cover costs.

Persons not parties to a suit have a right to appeal from the judgment

APPEAL—*Continued.*

rendered in it, if they intervene, and allege that they have been aggrieved by the judgment. And if it shall appear to this court that they have an interest in the suit, their appeal will be maintained.

Succession of John Clark. Pamelia Clark et al. Appellants. Mrs. Reilly et al. Appellees, 801.

No amendment of the judgment below will be made in favor of the appellee which he has not specially asked for.

Schwartz vs. *Cronan, 993.*

Where, in consequence of an agreement between the attorneys of a succession, and of its opposing creditors, entered into to prevent the record of appeal from being too bulky, certain necessary papers have been accidentally omitted, a writ of *certiorari* will be allowed to supply them.

Succession of R. H. Woods. On Opposition of Chubbuck et al., 1002.

Where, in a partition suit, the act of the lower judge complained of was done on his own motion, and neither he, nor the parties interested in the partition, are before this court, the appeal will be dismissed.

Ventress vs. *Brown, 1012.*

When the plaintiff in injunction appeals, by motion in open court, from the judgment dissolving the injunction and condemning him and the surety on his bond in damages *in solido*, the surety thereby becomes a party, appellee, and hence is disqualified from becoming the plaintiff's surety on his appeal bond.

An appeal taken separately by one of two defendants who have been condemned *in solido*, will not prevent the other from taking an appeal at a subsequent time, within the legal delay.

As between appellees, the judgment of the lower court will not be disturbed.

Sara T. Bowman vs. *Kaufman, Sheriff, et al., 1021.*

A suspensive appeal in a case prevents, pending the appeal, any proceeding, contradictorily taken, for fixing the fees due to a curator *ad hoc.*

State ex rel. Board of Trustees for the Blind vs. *Judge of Sixth District Court, 1026.*

When the judgment of the lower court on an exception filed to the account of a syndic, is in effect the dismissal of his account, and a refusal to hear his proofs of its correctness, he is entitled on his averment that he can file no other account, to an appeal from the judgment.

Succession of Oramel Hinckley. On Exception of Heirs, 1083.

APPEAL—*Continued.*

When the face of the papers sufficiently present the issue involved in an appeal from a justice's court, no statement of facts need appear in the record.

Parish of St. Martin ex rel. M. Baker, Road Overseer, vs. *Pelletier Delahoussaye*, *1092.*

When the signatures of the two sureties on an appeal bond appear at the bottom of the bond, and the name of *one* of them appears in the body of the bond, the bond is good and sufficient.

Widow Briant vs. *Désirée Hébert et al.*, *1127.*

The oath of an intervenor, going to show the nature and amount of his claim, is not admissible in evidence when filed for the first time in this court. *Meche* vs. *Lalamie*, *1136.*

An appeal will not lie to this court from the decree of an inferior court in a matter of *habeas corpus.*

The interest which entitles a party to appeal must be a real, existing interest in the particular cause, and not a conjectural one, contingent on the happening of an uncertain future event.

State ex rel. Agusti vs. *Houston, Sheriff*, *1174.*

Where a wife alleges in her petition that she is authorized by her husband to bring suit, and no exception is taken in the lower court, the question of her authority will not be considered on appeal.

John B. Durham vs. *Heirs of John B. Daugherty et al.*, *1255.*

This court will not order the production of an original act, when it is not necessary to the decision of the case.

Where a defendant who has enjoined an order of seizure and sale appeals from the decree rendered in the injunction suit, he is not thereby estopped from also appealing from the order of seizure and sale, when it appears that the grounds set up in the injunction suit are not the same as those presented in the appeal from the order.

John Frank Pargoud vs. *Mrs. Sarah Richardson*, *1286.*

Where in an application for a rehearing no time is asked in which to file a printed statement of the applicant's points and authorities, and none has been filed, the rehearing will be refused.

Lafayette Fire Insurance Co. vs. *Remmers*, *1347.*

Where the value of a certain piece of property, specifically insured for that value, is less than $500, this court is without jurisdiction of a suit to recover the value, even though the property was insured under a general policy which embraced other objects aggregating in value much more than $500.

Philip Werlein vs. *Merchants' Mutual Insurance Co.*, *1399.*

ATTACHMENT.

A creditor's oath to the fact alone of the non-residence of his debtor, gives him the right to attach the latter's property. He need not swear that the debtor "can not be cited." *DePoret* vs. *Gusman*, *930.*

ATTACHMENT—*Continued.*

Where property wrongfully attached is lost while in the sheriff's keeping, the owner is entitled to recover its full value from the plaintiff in attachment, and his sureties. If no malice is shown in the plaintiff, the owner is only entitled to full reparation for the actual damage he has suffered. *Teal* vs. *Lyons*, *1140.*

ATTORNEYS AT LAW.

Where it appears that the services of an attorney in settling up the complicated affairs of a succession have been long continued, wisely directed, and valuable, this court will be guided as to the money value of his services (in the absence of special agreement as to his fees, and of specific evidence as to the extent of his services) by the opinion of the local bar to which he belongs.

Succession of Jackson, *463.*

When parties silently acquiesce in and enjoy the benefits of a confession of judgment made in their names by an attorney at law, who has acted in the matter to their knowledge as their representative, they will be estopped from afterward denying the authority of the attorney to represent them.

Maraist, Fournet & Co. vs. *C. Caillier, Administratrix*, *1087.*

BACHELOR OF LAW.

A mere resolution, passed by the Board of Administrators of the University of Louisiana, that the degree of bachelor of law shall be granted to a certain person, and directing the President of the University to confer said degree, and the usual diploma, followed by a refusal of the President to obey the direction, has not the character and authority of a diploma.

The degree of bachelor of law, conferred on a party by the Board of Administrators of the University of Louisiana, will not authorize him to demand of this court a license to practice law in this State, unless the diploma is signed by the President of the University, and the Professors of the Department in which the student has graduated.

State ex rel. Duffel vs. *Marks*, *97.*

BANKRUPT LAW.

The amendment of the Bankrupt Act authorizing *compositions* to be made, was merely designed to provide another *mode* by which discharges in bankruptcy could be effected; but it was not intended to enlarge the scope of discharges, and thus enable the debtor to liberate himself from any class of obligations, which a discharge under the original bankrupt act would not free him from. Hence a composition, under the bankrupt act, will not release the debtor from any fiduciary debt. *Succession of Bayly*, *75.*

BANKRUPT LAW—*Continued.*

In determining what effect the discharge in bankruptcy of a principal debtor will have on the obligation of his surety, this court will be guided by the law of Louisiana and not by the bankrupt law.

J. M. Serra é Hijo vs. *Hoffman & Co.*, *67.*

Parties who have made a composition under the bankrupt act with their creditors, retain the right to sue in their own names, for whatever may be due them.

G. M. Bayly & Pond vs. *Stacey & Poland*, *1210.*

BILLS AND PROMISSORY NOTES.

One who has executed a promissory note in error, for a debt not due by her, may legally resist the payment of the note, so long as the note is not in the hands of an innocent third person, who has taken it for value before its maturity.

Bridget Reardon vs. *Daniel Moriarty et al.*, *120.*

Where a draft is drawn in favor of the payee on a certain fund to arise from the sale of property then in the drawee's hands, and the payment of the draft, by its own terms, is postponed to the payment, (out of the same fund), of a debt due the drawee, the drawee, who has not accepted the draft, is only liable for whatever balance of the fund may remain, after the payment of his own debt.

E. Marqueze & Co. vs. *S. Fernandez & Co.*, *195.*

Promissory notes given by a vendee for the price of a thing which the vendor assumed to sell, but which never had an existence, are utterly without consideration, and can not be enforced by the vendor or by any one who has acquired them after their maturity.

Cummings vs. *Saux*, *207.*

In order to recover from the maker of a promissory note it is not necessary to make a demand at the place of payment designated in the note. *Henry Renshaw* vs. *A. Keene Richards*, *398.*

The signer of a promissory note which reads that "we promise *in solido*," etc., will be held bound as a solidary debtor on such note, unless he proves that he has been legally released from his obligation. *Wm. H. Boullt* vs. *Jerome Sarpy et al.*, *494.*

Before the maker of a lost, or mislaid negotiable note, which was transferred before its maturity, can be made to pay it, he is entitled to be indemnified against its subsequent appearance.

Nalle & Cammack vs. *Conrad*, *503.*

The maker of a promissory note indorsed in blank, and acquired by the holder before its maturity, can not resist the payment of the note on the ground that the holder is not the real owner, unless he alleges and shows that he has good defenses, or claims, against the real owner.

BILLS AND PROMISSORY NOTES—*Continued.*

An agent in whose hands a note has been placed for collection, may sue on it in his own name.

George M. Klein vs. *Mrs. Buckner et al.*, *680.*

In the absence of any express or implied agreement, a party is not compelled to pay a draft drawn on him merely because he has been in the habit of paying similar drafts.

Helm vs. *Meyer, Weis & Co.*, *943.*

The makers of a promissory note can not annul a judgment obtained against them on said note by the administrator of a succession, on the ground that the note did not belong to the succession, or on the ground that the administrator was not qualified to act as such.

Maraist vs. *Guilbeau*, *1087.*

One who executes a promissory note in the name of another without authority to do so, becomes personally liable for the amount of the note. *Dodd, Brown & Co.* vs. *Bishop & Co.*, *1178.*

One who is publicly acting as the deputy of a notary, and whose oath of office has been administered by the notary himself, is qualified to make demand of payment and perform the other functions of a deputy notary. *Buckley* vs. *Seymour*, *1341.*

A promissory note which has for its consideration the discontinuance, by the holder of the note, of certain criminal proceedings instituted by him against a party for obtaining money under false pretenses, is void. *U. Ozanne* vs. *Abraham Haber*, *1384.*

Where in a contract of insurance which covers a storehouse, and the goods therein, it is stipulated that should the assured subsequently take out a policy in any other company, the assurers should receive notice of it on pain of forfeiting their policy, a subsequent assurance of the house, or the goods, in another company without notice to the assurers, will work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not.

Oscar Allen vs. *the Merchants' Mutual Insurance Co.*, *1386.*

BOARD OF LIQUIDATION.

The Board of Liquidators appointed to carry into effect the provisions of the Funding Act of 1874, can not refuse to fund any legal warrants, or bonds of the State, when required to do so by the owners, or the legal custodians of such bonds.

State ex rel. Board of Supervisors vs. *Board of Liquidators*, *816.*

The mere fact that certain valid State warrants paid to the State as the purchase price of State bonds that had been issued to the free-school fund, (and which the State had no power to sell,) are in the treasury of the State, and not in the hands of their owner, is not a ground for a refusal by the Board of Liquidation to fund them.

The Louisiana National Bank vs. *the Board of Liquidation*, *1356.*

BONDS.

The judgment creditor and his debtor are incompetent to form a private agreement, or bond, which shall have the force and effect, and be clothed with the extraordinary characteristics of a "Twelve-months Bond." *Eliza L. Strother* vs. *T. P. Richardson, Sheriff, et al., 1269.*

BONDS OF THE STATE.

Bonds of the State which are described by the Supplemental Funding Act of 1875 as "questioned and doubtful," can not be legally funded by the Board of Liquidation until they have been scrutinized, and declared valid by this court.

Although such bonds be negotiable in form, and have passed into the hands of innocent third persons, who have purchased them in open market, before their maturity, and for a valuable consideration, they nevertheless will not be a valid debt of the State, unless their holders prove that they were issued in accordance with law. The rule of the commercial law in favor of the holders of ordinary negotiable paper, is not applicable to such bonds.

The bonds of the State issued in favor of the "Bœuf and Crocodile Navigation Company," were not issued in conformity to law, as obviously appeared from the Act authorizing their issue, printed on the reverse sides of the bonds; and therefore are not binding obligations of the State.

Lord Cecil et al. vs. *the Board of Liquidation, 34.*

In the absence of proof to the contrary, it must be assumed that in the issue, and negotiation of certain State bonds nearly twenty-five years ago, the Governor and Treasurer, who were charged with their issue and negotiation, fulfilled the trust confided to them in accordance with the terms of the law which authorized the issue of the bonds.

Where bonds of the State, payable to the order of a certain payee, and indorsed in blank by the payee, are offered and received in evidence without objection, the indorsements will be deemed sufficiently proved to establish in the holder, a legal title to the bonds.

Bonds of the State that appear to have been issued according to law, and to have had a lawful consideration, are valid obligations of the State entitled to be funded.

H. W. Hamlin et al. vs. *the Board of Liquidators. Isidore Newman, Intervenor, 443.*

The bonds issued by the State in 1828 in favor of the "Consolidated Association of Planters of Louisiana," are valid obligations of the State, and entitled to be exchanged for consolidated bonds of the State, under the funding act passed by the Legislature in 1874. On such bonds the State is bound as principal, not as surety, and hence is not entitled to the right of discussion.

BONDS OF THE STATE—*Continued.*

Bonds of the State, the exchange of which for consolidated bonds subrogates the State to rights against third persons, should not be destroyed by the Board of Liquidation, but turned over to the proper State authorities for the benefit of the State.

Lesassier & Binder vs. *the Board of Liquidation, 611.*

The Funding Act of the Legislature, approved January 24, 1874, contemplated in its purpose, and embraced in its provisions, only the actual debt of the State. It excluded the contingent liability of the State embodied in the bonds loaned to the Citizens' Bank, and the Consolidated Planters' Association.

The State ex rel. New-Orleans Pacific Railway Company vs. *F. T. Nicholls, Governor, et al., 980.*

As to the *bona fide* holders of the bonds issued by the State in the year 1828 in aid of the Consolidated Association of the Planters of Louisiana, the State is the principal and sole obligor on those bonds, and such bonds are entitled to be received by the Board of Liquidation in exchange for the new consolidated bonds of the State.

Ed. J. Forstall & Sons vs. *Board of Liquidation, the State Intervenor, 1151.*

Where by an act of the Legislature bonds of the State are authorized to be issued and loaned to a corporation, on condition that it shall pledge certain of its own mortgage bonds, payable forty years after their execution, to secure the State, the tender of bonds by the corporation, the payment of all of which is made exigible whenever there shall be a six-months default in the payment of the interest on any of said bonds, is not such a compliance with the law, as will authorize the corporation to demand the issue of the State bonds. The fact that the bonds of the corporation, tendered as a pledge, are dated before the passage of the law authorizing the loan, and that they are made payable, at the holder's option, at another place in addition to that prescribed in the act, is immaterial.

State ex rel. New-Orleans Pacific Railroad Company vs. *Francis T. Nicholls et al., 1217.*

CERTIORARI.

The writ of *certiorari*, issued by a superior to inferior court, lies not only in causes of which the superior court has appellate jurisdiction, but likewise in causes in which there is no appeal, and where the inferior court is of the last resort.

The only court authorized to issue a writ of *certiorari* to an inferior court, is the one to which all appeals from the inferior court are made returnable.

This court has not appellate jurisdiction of criminal cases before the Recorders' Courts of New Orleans, when the penalty imposed is not

CERTIORARI—*Continued.*

death, nor imprisonment at hard labor, nor a fine exceeding three hundred dollars, nor where a fine or penalty imposed by municipal corporation is not involved; and hence is without authority, in such cases, to issue writs of *certiorari* to the Recorders' Courts.

The State ex rel. Herbert Geale vs. *the Recorder of the First Recorder's Court of New Orleans*, 450.

CHARGES TO JURIES.

See Judges.

CITIZENSHIP.

See Removal of Cases from State to Federal Courts.

CITATION, AND WAIVER OF.

See Practice and Pleading.

CITY OF NEW ORLEANS.

In virtue of an act of the Legislature, passed March 17, 1870, no creditor of the city of New Orleans, whether he be the holder of a liquidated, or an unliquidated claim, can compel by mandamus, any auditing officer of the city to issue, or deliver to him, a warrant for any amount due him; or compel any disbursing officer of the city to pay him any sum which he may claim that the city owes him.

State ex rel. Jacob Strauss vs. *J. G. Brown, Administrator of Public Accounts*, 78.

The approval by the Clerk and Judge of the Criminal Court of the parish of Orleans, of the account of the Criminal Sheriff, for fees and expenses of his office, does not amount to a judicial decree in his favor for the amount of the account, nor conclude the city of New Orleans from contesting the account. And if the city should dispute the correctness of his bill, he must, like the holder of any other contested bill, sue and obtain judgment on it, before he can ask for a mandamus to compel its payment.

State ex rel. James D. Houston vs. *the City of New Orleans*, 82.

It is the duty of the Mayor and Administrators of the city of New Orleans to set apart, and provide specifically, in the forthcoming yearly budget, out of the funds to arise from the *general* tax therein levied, means for paying *all* judgments against the city then registered in the office of the Administrator of Public Accounts, and unsatisfied, in the order of their registry. And this duty, the Mayor and Administrators may be compelled, by mandamus, to perform.

It is not their duty to levy a separate tax to pay such judgments; nor is it made obligatory on them to pay such judgments out of the fund in their hands set apart for contingent expenses; although they may, in their discretion, discharge the judgments out of that fund.

If the means arising from the general tax levied in one annual budget

CITY OF NEW ORLEANS—*Continued.*

are not sufficient to pay all of the registered judgments, provision must be made in each subsequent budget, until all of such judgments are successively extinguished.

The fact that the term of office of the existing Mayor and Administrators of a city is nearly expired, is no ground for defeating, or delaying the legal proceedings of a creditor of the city who has a good cause of action.

State ex rel. Carondelet Canal and Navigating Company vs. *Mayor and Administrators of New Orleans, 129.*

The city of New Orleans is obliged to keep its streets, sidewalks, and bridges repaired, and if on account of its neglectful delay in making a needed repair a person suffers an injury, to which he has not contributed by any fault of his own, the city will be liable in damages for the injury.

William O'Neill vs. *the City of New Orleans, 220.*

When a party who is sued in virtue of a contract made by a municipal corporation, denies, in general terms, that the corporation has complied with the law authorizing it to make such a contract, the burden of proof is on him to show that the law has not been complied with. The presumption is that the corporation has acted legally.

When the work of constructing sidewalks on one of the streets in the city of New Orleans has been done under a contract made at the discretion of the Common Council, each owner of property fronting on such street can only be held for two thirds of the cost of the sidewalk in front of his property.

Connell vs. *Hill, 251.*

A judgment creditor of the city of New Orleans who has registered his judgment in accordance with law, is entitled to a mandamus to compel the auditing and disbursing officers of the city respectively to warrant for and pay the same, or so much thereof as there may be a special fund in the city treasury to pay such judgment; and no misapplication of such fund by any, or all of the officers of the corporation, can hinder or defeat the rights of the creditors entitled to be paid out of such fund.

State ex rel. Carondelet Canal and Navigation Co. vs. *Pilsbury, Mayor, 705.*

Under the present charter of the city of New Orleans the Common Council may lawfully assign to the Administrator of Commerce the superintendence, and management of the bridges across the navigable canals of said city.

John McCaffrey, Administrator, vs. *Charles Cavanac, Administrator, 882.*

CITY OF NEW ORLEANS—*Continued.*

Under the present charter of the city of New Orleans, the city may obtain the dissolution of an injunction against it, without furnishing the bond and security required of other litigants by article 307 of the Code of Practice.

The Jefferson and Lake Pontchartrain Railway Company vs. *the City of New Orleans, 970.*

The city of New Orleans is not entitled to a preference for license dues, unless its claim for the same has been registered.

Cochran vs. *Ocean Dry-Dock Company, 1365.*

The city of New Orleans can not be compelled to re-imburse the drainage taxes voluntarily paid to the Drainage Commissioners, and actually expended for drainage purposes.

New-Orleans Canal and Banking Co. vs. *City of New Orleans, 1371.*

CLERKS OF COURT.

A compact with his deputy made by a clerk of court, which stipulates that the deputy shall perform the duties of the office, and the clerk shall receive a proportion of the official fees, or a fixed monthly sum, is not such a transaction as will forfeit the clerk's right to his office, and thus create a vacancy in it.

State ex rel. Lisso vs. *Peck, 280.*

The clerk of the parish court in which a succession is being administered has authority to issue a *fi. fa.* for the seizure and sale of any property of the succession, previously sold on a twelve-months bond, and not paid for, without regard to its value.

Cobb vs. *Richardson, Sheriff, 1228.*

The clerk of the court is without authority to issue, and the sheriff to execute a writ of *fieri facias* to enforce, with a judicial decree, the provisions of a bond formed by private convention.

Strother vs. *Richardson, 1269.*

COMMUNITY.

The community formed by a man's second marriage can not be held liable for the value of property belonging to a former community, sold by him during his second marriage, unless it be proved that the proceeds of such property were expended for the benefit of the second community.

The debt due by a father to his children by a former marriage, for their half of the proceeds of the community property sold by him, is exigible against his succession, and its payment can not be defeated or delayed by any claim of usufruct made by the surviving widow of his second marriage.

Succession of Jean C. Bollinger. Opposition of Paul and Mathieu Ballatin, 193.

COMMUNITY—*Continued.*

All property found in the succession of a deceased husband, or wife, and in the possession of the surviving husband, or wife, is presumed by law to be community property, until the contrary be proved.

When separate funds of the husband have been used to benefit and enrich the community, it will constitute a debt of the community in favor of the husband, or his succession, to the amount of such funds. But the evidence must establish with reasonable certainty, that the funds thus used were really the separate property of the husband; merely making that fact probable is not sufficient.

Money received by the executor of a deceased husband, arising from the liquidation of a former commercial firm of which the husband was a partner for several months after his marriage, can not be deducted from the community, until it is shown that such money was not a part of the husband's share of the profits earned by his firm during his marriage.

Mrs. Ada Pierce Denègre vs. *Mrs. Silvaine Denègre et al., Executors of John Denègre, 275.*

The fees due the lawyer for successfully defending a wife in a suit of her interdiction brought by her husband, are a debt for the community.

Breaux, Fenner & Hall vs. *Francke, 336.*

It will be presumed that the community of acquets and gains exists between the husband and wife until the contrary is shown.

Jacob C. Van Wickle vs. *O. H. Violet and Wife, 1106.*

COMPENSATION.

A debt due to a municipal corporation for *taxes*, can not be offset, or compensated, by any debt due by the corporation. Thus the tax due for one year, can not be compensated by an overpayment of taxes made by the debtor the year previous.

The City of New Orleans vs. *John Davidson et al., 541.*

The taxes due a municipal corporation for one year, can not be compensated by an overpayment of taxes made by the debtor the year previous.

City of New Orleans vs. *J. Davidson and J. D. Hill et al., 554.*

CONFISCATION SALES.

The ownership acquired in virtue of a *confiscation* sale, under the act of Congress of 1862 amounted to a mere usufruct. It was and could be only imperfect, and was to terminate with the life of him against whose interests and property the confiscation proceedings were directed. There is wanting therefore in the title of one who purchased the property at a confiscation sale the quality of ownership necessary to enable him to prescribe.

CONFISCATION SALES—*Continued.*

The fact that the price paid by a purchaser of property at a confiscation sale was used to pay off a pre-existing mortgage on the property, does not entitle such purchaser to demand that he shall be refunded the price, when, at the expiration of his usufruct, the owners of the property call on him to restore it to them. Nor can he demand that he shall be re-imbursed what he has expended for repairs, and taxes on the property. *Pendegast* vs. *Schawtz*, 590.

CONSTITUTION.

The constitution, like legislative acts, must, if possible, be construed in such a way as to render all of its provisions operative, rather than in a way that will make some of them nugatory.

Decklar vs. *Frankenberger*, 410.

The constitutional amendment limiting the debt of the State to fifteen millions of dollars only restrains the Legislature from increasing the actual, or present debt of the State beyond that sum. It does not inhibit any increase of the contingent liability of the State.

State ex rel. New-Orleans Pacific Railway Co. vs. *Nicholls, Governor*, 980.

CONTRACTS.

The reduction of an agreement to writing, signed by the parties, is not necessary to its perfection as a contract, unless it clearly appears that the parties intended that it should not be complete as a contract, until so written and signed.

Montague et al. vs. *Weil & Bro.*, 50.

When it clearly appears from the evidence that the intent of parties was to form a written contract, neither party will be bound until the contract has been reduced to writing, and signed by both. No alleged verbal agreement, in such case, can be invoked by either party against the other.

Louisa Fredericks, Tutrix, vs. *Robert Fasnacht*, 117.

Contracts having an unlawful or immoral cause are not merely void themselves, but as a rule, can not be the basis of any valid auxiliary contract. *Cummings* vs. *Saux*, 207.

When one party submits a proposal for a contract to another, and the latter's acceptance of the proposal includes a material modification of the proposal, no contract will result until the modification has been acquiesced in by the party making the proposal.

Nicholas Connell vs. *Alexander Hill*, 251.

Where in a contract to deliver a certain thing, no *time* for the delivery is fixed, the legal implication is that it shall be delivered within a reasonable time from the date of the contract.

Robert H. Bartley vs. *City of New Orleans*, 264.

CONTRACTS—*Continued.*

Where the evidence shows that the parties intended, originally, that the contract of lease should be reduced to writing, neither will be bound until it is signed by both.

Miguel Avendano vs. *I. W. Arthur & Co.*, *316.*

A planter who has agreed to consign, and pay commissions on his *entire* crop to his factors, in consideration of certain promises and stipulations in his favor made by the factors, is released from his obligation to consign and pay such commission on whatever balance of his crop he may have on hand, when the factors shall fail and refuse to comply with *their* stipulations; more particularly when the failure of the factors to perform their part of the contract, disables the planter from performing his part of it.

Nalle & Cammack vs. *A. L. D. Conrad et al.*, *503.*

One who has formed a valid contract can not claim a release from its obligations, on account of an error of judgment, or ignorance of the law regulating the rights and obligations of married women, in this State, when it appears that he had another motive for making the contract, besides the error of law, and no fraud, or bad faith is shown on either side. *Forrester* vs. *Mann*, *542.*

Ministers of the Methodist Church are entitled to recover for their services, as ministers, whatever salary their congregations may have contracted to pay them.

Jones vs. *Trustees of the Congregation of Mount Zion*, *711.*

The written agreement of a debtor who has borrowed certain bonds, to return bonds of the same description, for the same amount, at a certain term, is not a promissory note for the amount of the bonds. The obligation is to return the specific bonds at the time fixed, or pay their value at that time.

Blouin vs. *Liquidators of Hart & Hebert*, *714.*

Those are third persons to a contract who are not parties to it.

Van Loan vs. *Heffner*, *1213.*

CONTRIBUTORY NEGLECT.

SEE DAMAGES.

CO-PROPRIETORS.

Where property sold at public sale is bought by three persons in indivision, each being entitled, by agreement among themselves to a certain undivided portion of the property, any one of the common owners who has paid his share of the adjudicated price, has a right to demand from the sheriff a deed of sale for his undivided portion; and no one of the co-proprietors is entitled to oppose the demand on the ground that the taxes on the property have not been paid.

Nathaniel Montross vs. *Samuel Jamison*, *172.*

CORPORATIONS.

A mere change in the title of an officer who performs certain, described functions in the government of a city, will not make him amenable to the operation of a summary writ, from which, under his former title, he was exempted by special statute.

State ex rel. Strauss vs. *Brown*, 78.

Under a contract with a city corporation to do certain work, a contractor can not claim compensation for new, and additional work done by direction of a city official, without the consent of the city, which was not stipulated for in the contract expressly, or by implication, and which cost more than the work actually contracted for.

O'Hara vs. *City of New Orleans*, 152.

When it appears that the parties in charge of the property and affairs of a corporation, as liquidators of the same, have been elected as such by the stockholders of the corporation, and their election has not been set aside, and no fear of fraudulent action on their part is alleged, no court is authorized to displace them, and appoint a receiver in their stead.

John F. Follett et al. vs. *Spencer Field, President, et al.*, 161.

A municipal corporation authorized by its charter to construct wharves on its river front, and impose wharfage dues for the use of its wharves, has the right to collect such dues, proportioned to the vessel's tonnage, on all vessels that land at, and make use of the wharves constructed by such corporation. The collection of such dues does not violate any provision of the constitution of the United States.

Where a municipal corporation, under the express authority of an act of the Legislature, is clothed with the exclusive right to collect wharfage rates from all vessels that shall make use of its wharves, the right is a vested right, and can not be abrogated, or impaired, by any subsequent act of the Legislature.

Henry Ellerman vs. *John McMains et al.*, 190.

A contract entered into by a member of a city council, either in his own name or in the name of another person, which the charter of the city prohibits him from making, is absolutely null and void.

P. H. Cummings, J. H. Cummings, Subrogee, vs. *J. M. Saux*, 207.

A legal by-law of a corporation which provides that no shares of its stock shall be transferred on its books, until the certificate thereof has been surrendered to its president, or shown to be lost, is binding on all its stockholders, and their heirs. Before the heirs of a deceased stockholder can compel the corporation to transfer shares, or pay accrued dividends to them, they must comply with the requirements of the by-laws.

State ex rel. Martin et al. vs. *N. O. & Carrollton R. R. Co.*, 308.

CORPORATIONS—*Continued.*

When the charter of a corporation provides that in case any subsequent increase of the capital of the concern is authorized, notice of sixty days shall be given of such increase, within which time the stockholders shall have the privilege of taking additional shares, proportioned to the amount of their stock, and that any shares, not taken at the expiration of that time, may be disposed of by the directors for the benefit of the association,

Held—That in order to entitle a stockholder to demand said additional shares, it must appear that he applied for the shares, and paid over or tendered the money, necessary to purchase the same, before the expiration of the sixty days; or before the expiration of any additional delay, which may have been given by the corporation to enable the stockholders to exercise said privilege.

Mrs. Emily L. Hart et al. vs. *St. Charles Street Railroad Co.*, 758.

A corporation which is entitled by its charter to sue for fines and penalties for violations of its privileges, is likewise entitled to sue out writs of injunction to prevent and restrain from the violations of those privileges.

Crescent City Live-Stock and Slaughter-House Company vs. *Larrieux*, 798.

Section 2593 *et seq.* of the Revised Statutes of 1870 does not provide for the forfeiture of the charters of corporations at the instance of private persons, even when they are parties interested.

The State ex rel. Martin Lannes et al. vs. *the Attorney General of the State*, 954.

No loss suffered by a stockholder, in consequence of a call authorized by the charter of the corporation, made upon each stockholder to pay a proportion of the price due on his stock, will give rise to a claim for damages against the directors of the corporation.

Succession of Woods, 1002.

Where the charter of a municipal corporation requires the mayor's sanction to all the enactments of the Board of Selectmen, such enactments will be inoperative unless signed by the mayor.

The promulgation of an ordinance enacted by the Board of Selectmen of Breaux's Bridge, by merely posting the ordinance, is without effect, when the ordinance has not been signed by the mayor, and by the secretary of the board.

No law or ordinance passed by a town council can have any binding effect unless promulgated and preserved in the English language.

When the fact is denied that a certain ordinance has been enacted by a town council, the fact can only be proved by the deliberations of the council, and their promulgation, duly attested.

Mayor et al. of Breaux's Bridge vs. *Valerien Dupuis*, 1105.

CORPORATIONS—*Continued.*

The stockholders of a corporation have no right to appropriate any part of its assets to pay salaries due them as officers of the company, or due them on any other account, until all creditors, who are not stockholders, have been paid.

Cochran vs. *Ocean Dry Dock Company, 1365.*

The *bona fide* sale of the stock of an incorporated company, coupled with a power of attorney to the vendee to transfer it on the books of the company, is made complete by the delivery to the vendee of the certificate of stock. It is not necessary to the perfection of the sale, and the consequent protection of the stock from the seizure of the vendor's creditors, that notice of the sale should be served on the corporation, or that an actual transfer of the stock should have been made on its books.

Samuel & A. W. Smith vs. *Crescent City Live-Stock Landing and Slaughter-House Company, 1378.*

COSTS.

The costs of a suit brought by the holder of bonds to compel the Board of Liquidators to fund his bonds, must be paid out of the treasury of the State, if the Board is cast in the suit.

Hamlin et al. vs. *the Board of Liquidators, 443.*

In all appeals to this court the appellant is primarily liable for all the costs occasioned by the appeal, and may be compelled to pay them.

State ex rel. Baltor vs. *Judge of the Fourth District Court, 599.*

COUNTER-LETTERS.

Counter-letters can have no effect against creditors, or *bona fide* purchasers. *Billgery* vs. *Ferguson, 48.*

COURTS.

The death of a defendant to a suit pending in a court of ordinary jurisdiction, does not divest that court of jurisdiction, and work the transfer of the case to the probate court. The suit remains where it was instituted, but only to be proceeded with when the legal representative of the deceased defendant is made a party.

The probate court of a parish has no authority to appoint a curator *ad hoc* to represent the heirs of a deceased defendant to a suit pending in a court of ordinary jurisdiction, when the succession of the deceased has not been opened; only the court before which the suit is pending has the legal right to appoint such a curator.

Bussy & Co. vs. *Nelson, 25.*

Where by a judgment of the circuit court of the United States the assets of a corporation have been taken possession of, and placed in the hands of a receiver, no writ of attachment, or any other process can legally issue from any other court to disturb the re-

COURTS—*Continued.*

ceiver's possession of such assets, or take effect on any right, or debt, that may have accrued in favor of the corporation after the receiver had qualified, and taken charge.

Gest & Atkinson vs. *N. O., St. Louis, and Chicago Railroad Company, 28.*

The act of the Legislature passed in 1877, which gives to the Third District Court of the parish of Orleans, in certain enumerated cases, concurrent jurisdiction with the Fourth, Fifth, and Sixth District Courts of said parish, is not in violation of any provision of the State constitution.

Lord Cecil et al. vs. *the Board of Liquidation, 34.*

When the crime *charged* in the indictment is one of which the Superior Criminal Court has jurisdiction, the finding of the jury for any smaller crime will not divest that court of jurisdiction.

State vs. *Malloy, 61.*

The State courts have jurisdiction to determine whether a debtor is released from certain debts, by his discharge in bankruptcy.

Succession of R. H. Bayly. Opposition of Washington and Lee University, 75.

In criminal cases this court have no jurisdiction of questions of fact.

State vs. *Harris et al., 90.*

The question whether one of the jurors in a criminal case was, or was not disqualified to act as a juror, on the score of being too prejudiced to render an impartial verdict, is a question of fact for the lower court to determine, and of which this court has no jurisdiction.

State vs. *Shay, 114.*

The Second District Court for the parish of Orleans is without jurisdiction of a suit, brought by the purchaser of property at a tax-sale, to be put in possession of the property.

William A. Gordon vs. *Miss Marie C. Goulé, 138.*

The parish court is without jurisdiction of a suit for partition between the surviving widow and the heirs of the decedent, when it appears that the widow had accepted and disposed of her interest in the community, and that the heirs, who are of age, had unconditionally accepted the succession and been put in possession of its property. In such a case the succession no longer exists.

Sarah and Austin Woolfolk vs. *Mrs. Emily Woolfolk, 139.*

The probate court has no jurisdiction of a suit brought by the heirs of one succession, against the executor of another succession, for a partition of property which belongs, in certain undivided proportions, to both successions.

Boutté et al. vs. *Executors of Boutté, 177.*

COURTS—*Continued.*

Where the issue involved in the verdict of a jury, and judgment of the lower court, is damages for an alleged assault and battery, this court will not disturb such verdict, and judgment, where they do not clearly appear to be unjust. *Johns* vs. *Brinker*, 241.

A mortgage creditor has the legal right to proceed by executory process in a court of ordinary jurisdiction, against any property of a succession to which his mortgage attaches, and subject the proceeds of the property to the satisfaction of his debt.

Hypolite Gally vs. *Michael Dowling, Curator*, 323.

The Third District Court for the parish of Orleans having exclusive jurisdiction of all suits to enjoin proceedings in justices' courts, the Superior District Court was utterly without jurisdiction of such suits, and had no power to impair, or interfere in any way, with this exclusive jurisdiction of the Third District Court.

Mrs. Mary Sexton vs. *M. O. Sullivan et al.*, 342.

This court has not jurisdiction of a suit against the executor of a succession, when the amount claimed is less than $500, and it further appears that all the assets of the succession have passed into the hands of the heirs.

Succession of John L. Pointer. On Opposition of Messrs. Barrow & Pope and V. J. Dupuy, 370.

The question of the sufficiency, or insufficiency of the evidence to convict, is one of which this court has no jurisdiction.

State vs. *Snow*, 401.

The parish courts have exclusive jurisdiction in ordinary suits in all cases where the amount in dispute exceeds one hundred dollars, exclusive of interest, and does not exceed five hundred dollars, exclusive of interest.

Thus, where the *principal* of the amount in dispute is exactly $500, the parish courts have jurisdiction, even though there be enough accrued interest demanded to make the whole amount in dispute much more than $500.

Adam Decklar vs. *D. Frankenberger*, 410.

This court has direct and exclusive jurisdiction of appeals in *all* cases whether instituted in district, or justices' courts, where the constitutionality and legality of a tax is put at issue; irrespective of the amount in dispute. And this jurisdiction will not be ousted, or impaired because there are questions of fact in the case, distinct from that of the constitutionality of the tax. In all cases, except criminal cases, of which this court is vested of jurisdiction, it has authority to pass on all questions of fact, or of law, involved; and the appellant from a judgment of a justice's court, involving the constitutionality of a tax, can not defeat the jurisdiction of this court

COURTS—*Continued.*

by waiving that issue, and appealing to the Third District Court on a mere issue of fact in the case.

State ex rel. Victor Boutroue vs. *the Judge of the Third District Court of Orleans et al.*, *415.*

In actions to annul, and enjoin judgment, as between the parties thereto, the jurisdiction of this court depends on the amount of the judgment sought to be annulled, and not on the value of property seized under it, or the amount of damages claimed by the appellant. Thus if the judgment sought to be annulled is under $500, the appellant can not give jurisdiction to this court by setting up a claim of damages for more than $500.

William L. Cushing et al. vs. *Sambola & Ducros et al.*, *426.*

The parish court in which a succession has been opened, and which has thus acquired control of the property of the succession, has jurisdiction of a suit brought by the heirs of the succession to enjoin and prohibit the nominal administrator of the succession from acting as such, and from executing a certain judgment obtained by him, as administrator, in the district court.

Marietta J. Brown and Husband vs. *J. N. Brown, Administrator*, *506.*

The parish court has jurisdiction to emancipate a minor, even when the minor is the owner of property worth more than $500.

Cooper and Wife vs. *Rhodes*, *533.*

State and parish officers, and the sureties on their official bonds may be sued, on account of any malfeasance of such officers, in the courts of the parish in which the officers exercise, or may have exercised their functions, no matter where their domiciles may be.

School Board vs. *Emile L. Weber et al.*, *593.*

Corporations can not be sued in any other but the courts of their domicile for damages arising out of their passive breaches of contract. It is only for damages caused by an *active* breach of contract that they can be sued away from their domicile, and in the parish where the damage has been done.

J. W. Montgomery vs. *the Louisiana Levee Company*, *607.*

When three individuals, not partners, or otherwise associated in business, whose rights are several, and distinct, unite in one petition and claim that by some alleged wrong of the defendant, they will be jointly damaged to the extent of only one thousand dollars, this court will not have jurisdiction, since the interest of each plaintiff is less than five hundred dollars.

John Larrieux et al. vs. *Crescent City Live-Stock Landing and Slaughter-House Company*, *609.*

COURTS—*Continued.*

Where a suit involving conflicting liens and mortgages on certain property is instituted in one court, and all persons in interest are made parties to the suit, the subsequent institution of another suit, in a different court, by two of the parties is a fraud on justice, and will not divest the former court of jurisdiction to determine all the issues between the parties, in respect of the mortgaged property, without regard to any changes in the title or possession of the property.

Barkdull vs. *Herwig & Smith, 618.*

When the original claim of a judgment creditor when first sued on in a district court is over $500, the mere fact that subsequent payments made by the defendant have so reduced the amount of the judgment that it can not be appealed from, can not have a retroactive effect so as to divest the district court of jurisdiction of the suit, or impair its right to issue executions as long as any part of the judgment remained unsatisfied. *Picard & Weil* vs. *Wade, 623.*

In the absence of evidence as to the amount in dispute in a suit on appeal before this court, it will not be inferred that a sufficient sum is involved to give this court jurisdiction merely from the fact that there were two judgments of the district court enjoined. This court will not assume jurisdiction on an inference.

H. R. Wade vs. *R. J. Loudon and Sheriff, 660.*

A sentence of the lower court sending a party to prison for some act of contempt committed during the trial of a case, is no part of the case, and hence the amount in dispute in the case has no bearing on the question of the jurisdiction of this court as to the sentence of the lower court in the matter of the contempt. Nor can an allegation that the imprisonment of the petitioner will damage him to an amount above the appealable sum, give this court jurisdiction.

James Wood to the Court, 672.

The district court is utterly without jurisdiction of a suit by parties against the succession of their former tutor, then under administration in the parish court. *Lusk* vs. *Succession of Benton, 686.*

After the bond required by the lower court has been given, and filed, that court has no further jurisdiction of the case, except to pass upon the solvency and sufficiency of the sureties on the appeal bond. The lower court can not set aside a suspensive appeal, or make it a devolutive one, on the ground that the amount of the bond (fixed by itself in a case where the court is required to fix it) is not the correct amount.

State ex rel. Kramer vs. *Judge Sixth District Court, 1014.*

The parish court has exclusive jurisdiction of suits to annul wills, and set aside the probates of the same.

The nullity of proceedings for the probate of a will, and of the orders

COURTS—*Continued.*

in execution of it must be sued for in the court which decreed the probate, and made the orders.

If different causes of action be alleged in a suit brought in a probate court, of some of which causes the court has jurisdiction, and of some, not, it should take cognizance of the former causes and reject the latter.

Where a court has once acquired jurisdiction of a suit, that jurisdiction will be maintained. It can not be impaired by a claim in reconvention, or intervention, of which the court has not original jurisdiction.

A demand in intervention must be before the court in which the main action lies, and must follow that jurisdiction when it is really incidental and coliateral to the main suit.

One whose title to lands (worth over $500) depends on the validity of a certain will, may intervene in a suit brought in the parish court to annul the will, in order to set up, and vindicate his title, and the intervenor's title, being thus put at issue, the plaintiff may contest it to show that the former had no right to intervene. But no inquiry into the validity or enforcement of mortgage claims on such lands, set up by the plaintiffs, will be allowed.

A parish court which is without jurisdiction of a suit brought before it, has no authority to issue an order to transfer the suit to the district court. It has only power to dismiss the suit.

Succession of Jacob Hoover et al. vs. *Z. York and E. J. Hoover, Executors. A. G. Ober, Intervenor, 752.*

A resident of the Sixth Municipal District of the city of New Orleans sued in one of the district courts for the parish of Orleans, and served with citation prior to the seventh of November, 1876, remains, as to that suit, subject to the jurisdiction of said court.

After a case has been fixed for trial the court is without authority to order it to be tried by jury.

Wm. Reed Mills vs. *J. Q. A. Fellows, 824.*

A suit instituted in one parish before a certain district judge, may, by consent of all the parties, be legally tried, and decided by the same judge while holding court in another parish of the district.

James Sharkey, Tutor, vs. *Leslie Bankston, 891.*

Where the legality of a tax is in dispute this court has jurisdiction irrespective of the amount involved. *The State* vs. *David Sies, 918.*

The probate court has jurisdiction to order the sale of the property of an insolvent succession without convoking a meeting of its creditors. *Succession of Lacroix, 924.*

A parish court is not competent to review, or reverse a judgment of the district court. *Succession of Quin, 947.*

COURTS—*Continued.*

A suit against a party for an amount due by a vacant succession, on the ground that the defendant had made himself liable by taking unauthorized possession of the effects of the succession with intent to convert them to his own use, is not a suit against the succession, and hence, none but a court of ordinary jurisdiction can take cognizance of it. *Peet, Yale & Bowling* vs. *Nalle & Cammack, 949.*

A suit to revive the judgment in a probate case, rendered by a district court before the creation of parish courts by the constitution of 1868, must be brought in the district court that rendered the judgment. Probate suits in which judgments had been rendered, were not transferred from the district to the parish courts.

Thomas LaChambre & Co. vs. *Henrietta and J. L. Cole, 961.*

The suit brought by an executor against a third person who is the undivided half-owner of certain property, of which the succession owns the other half, for the purpose of effecting a partition of the property, and also for a settlement of accounts with the defendant, does not involve probate matters, and therefore the probate court in which the succession was opened has no jurisdiction of the suit.

Succession of R. H. Baily vs. *M. A. Becnel, 1032.*

When the constitutionality of a tax is at issue, this court has jurisdiction regardless of the amount in dispute.

The justices' courts have authority to issue injunctions in all tax suits brought before them of which they have jurisdiction.

When a party sues in a justice's court to enjoin the collection of an alleged illegal tax, it is not necessary to allege any specific indebtedness by way of damages, in order to give the court jurisdiction.

Frank Gonzales vs. *J. T. Lindsay, Tax Collector, 1085.*

In an action to annul a *dation en paiement* of certain property worth more than $500 the district court has jurisdiction, although the debt due the creditor who sues to annul is less than $500.

Queyrouze & Bois et al. vs. *P. E. Thibodeaux et al., 1114.*

The parish judge has authority to sentence the accused to imprisonment in the Penitentiary in criminal cases wherein the defendant has waived trial by jury. *State* vs. *Williams, 1162.*

The jurisdiction of this court does not extend to cases of conviction under act No. 9 of the Legislature passed in 1874.

The State ex rel. A. Agusti vs. *J. D. Houston, Sheriff, 1174.*

The parish courts have exclusive original jurisdiction of suits brought against the administrator of a former tutor by the former wards of the latter for a settlement of the tutorship.

Cawthorn vs. *Cawthorn, 1181.*

The parish court has exclusive original jurisdiction in all ordinary suits, in which the sum involved is less than $500 exclusive of interest.

COURTS—*Continued.*

This court has appellate jurisdiction of all judgments rendered by the district court in cases appealed from the parish courts, when the amount involved, including principal and interest, is more than $500.
Newman Brothers vs. *S. E. Cuney, 1201.*

A valid and legal decree of a parish court can not be arrested at the instance of the judgment debtor, by an injunction issuing from any other court.
R. G. Cobb, Curator, vs. *T. P. Richardson, Sheriff, et al., 1228.*

This court has jurisdiction of all suits which involve the legality of a tax, without regard to the amount in dispute.
The Parish of Lincoln vs. *J. G. Huey, 1244.*

Where a party agrees to pay a certain stated account made up of principal and accrued interest, and the aggregate amount of the principal and interest exceeds $500, the district court will have jurisdiction of the debt. *I. Bloom & Co.* vs. *Leon Kern et al., 1263.*

This court is without jurisdiction to consider the testimony of witnesses, and disputed questions of fact, on which applications for new trials in criminal cases are made. *State* vs. *Beatty, 1266.*

The district court has jurisdiction of a suit brought by one heir against his co-heirs for his share of the succession, which has been administered and is at an end. *Harrington* vs. *Barfield et al., 1297.*

The jurisdiction of the Second District Court for the parish of Orleans is exclusively probate, and it has no power to entertain a question of title to real estate claimed by majors alone.

A suit for the partition of property which belongs in part to minors, and in part to majors, does not fall within probate jurisdiction. It must be brought in a court of ordinary jurisdiction.
W. S. Benedict vs. *J. A. Florat, Tutor, et al., 1337.*

No district court of the parish of Orleans has authority to issue a writ of injunction to restrain the execution of a judgment rendered by any other district court of that parish. The court which renders the judgment can alone enjoin its execution.
State ex rel. J. P. Becker vs. *Judge Sixth District Court, 1350.*

A suit by forced heirs against those in possession of the property of the succession, claiming to be owners under an executed will, instituted to annul the whole or part of the will, is properly brought in the probate court in which the will was admitted to probate and executed. *John Blasini* vs. *Succession of Silvestre Blasini, 1388.*

An action of revendication of an immovable may be brought where the defendant resides, or where the property is situated.

A suit for the rents of the immovable involved in an action of revendication is properly brought where the property is situated.
Charles Maduel, Executor, et al. vs. *Jules Tuyes et al., 1404.*

CRIMINAL LAW.

The judge presiding at a criminal trial can not, either in his charge to the jury, or at any time during the trial, declare the existence of any fact bearing on the case at issue, or deny the existence of any such fact, when it is asserted to the jury by the counsel of the accused in the course of his argument.

State vs. *George Washington et al.*, *49.*

A criminal information may in two separate counts, charge two separate, but kindred offenses, growing out of the same transaction. Such an information is not obnoxious to the objection of duplicity.

An information charging the crime of burglary, or grand larceny, describes the place where the offense was committed with sufficient certainty when it gives the parish, the name of the owner of the house, and the house in which the offense is alleged to have been committed.

Where an information under the count of grand larceny, charges the theft of various things of small value, a verdict of the jury that the accused is guilty of "petit" larceny is sufficiently responsive to the indictment, and does not amount to an acquittal on the count of grand larceny.

The State vs. *Pat. Malloy*, *61.*

On the trial of a motion in arrest of judgment in a criminal case, evidence will not be admitted to prove any error complained of, unless the error appears on the face of the indictment, or the proceedings.

After a verdict has been returned in a criminal case, it is too late to object to the composition of the jury that rendered the verdict, on the ground that some of the jury were too ignorant, or too illiterate to understand the evidence. Such objection should have been made a ground of challenge to the disqualified jurors.

The objection that the jury in a criminal case were not summoned under an order of the court before which the accused was tried, will not be sustained, on a motion in arrest of judgment, when it appears that the jury was summoned by a competent officer, before a competent court.

State vs. *Moses Harris et al.*, *90.*

An accused person, who with full knowledge of the fact that the jury by whom he is to be tried was drawn from a list of persons, composed partly of those who had been excused from serving, goes to trial without making any objection to the composition of the jury, thereby waives his right of objection, and can not thereafter, on that ground, ask that the verdict of the jury shall be disturbed.

The place where an alleged murder was committed is set forth with sufficient certainty, when the indictment gives the name of the parish in which the killing is charged to have been done, and states that it

CRIMINAL LAW—*Continued.*

took place within the jurisdiction of the court before whom the accused is tried.

In an indictment for murder it is not necessary to set forth the specific manner, and means of the killing. It is only necessary to charge that the accused did willfully, feloniously, and with malice aforethought kill, and murder the deceased.

It is too late to urge any objection to an indictment on account of any defect of form apparent on its face, after the jury has been sworn.

State vs. *Daniel Shay, 114.*

The facts set forth in the affidavit of a party accused of a crime, in support of his motion for a continuance, are, for the purposes of the motion, to be taken as true. They can not be traversed, or contradicted by counter affidavits, or other evidence.

When the confessions of a prisoner to the committing magistrate have been reduced to writing, but on being offered in evidence on the trial of the accused, are, on his motion, rejected on account of defects of form in the writing, his voluntary declarations to the magistrate may be proved by parol.

To warrant a conviction on circumstantial evidence, it is necessary that the circumstances should be of such a nature, and so related, as to leave no reasonable doubt that the accused is guilty of the offense with which he is charged. It is not necessary that the circumstances should produce that positive conviction which would flow from the testimony of a reliable witness.

The State vs. *Alfred Simien, 296.*

The words "against the peace and dignity of the same" need only conclude those averments in an indictment which are necessary to perfect it as an indictment. The words need not conclude a recital of facts following the essential averments, inserted merely to provide against an apprehended plea of prescription.

Where a party has been indicted and convicted of shooting with intent to murder, and on appeal this court sets the verdict aside, and orders the custody of the accused until the finding of a new bill, the plea of prescription of one year, on the ground that the new bill was not found until after a year from the commission of the offense, will not be maintained.

The State vs. *Jacob Thomas, 301.*

A verdict of conviction in a criminal case will not be set aside, and a new trial granted, on the ground that one of the witnesses for the State has made unsworn statements since the trial, which contradict his testimony on the trial; especially when it appears that in the opinion of the judge below the testimony given by other witnesses on the trial fully warranted the conviction.

CRIMINAL LAW—*Continued.*

When an indictment for the larceny of an animal charges the crime of larceny with all the fullness, and precision required by law, the addition of the words "and kill," will be treated as mere surplusage. They will not change the character, or lower the grade of the crime charged.

The State vs. *Jim Johnson, 305.*

It is so absolutely necessary to the validity of criminal proceedings and the verdict found thereon that a plea on his behalf should be filed to the indictment found against the accused, that the failure to file such a plea will vitiate the proceedings, and justify the setting aside of the verdict.

The presence of the accused, at the time the verdict against him for a felonious offense is received, is essential to the validity of the verdict.

Under an indictment for one offense a legal conviction can only be had for another offense of less magnitude, when the latter offense is of the same nature, or kind, as the one charged. Thus, under an indictment for burglary, a verdict convicting the accused of petit larceny is invalid.

The State vs. *Alfred Ford, 311.*

The absence of a witness is not ground for continuance in a criminal case, unless the defendant, in his application for a continuance, makes oath that he can not prove by any other witness, the facts he seeks to prove by the absent witness.

Where three persons have been jointly indicted for the same crime, the condemnation and sentence of two of them will not be disturbed, because the verdict against the two was rendered in the absence of the third.

Where the defendant in a criminal proceeding, pending the argument on his motion for a new trial, moves to amend his motion, on new and different grounds that alter its substance, it is within the reasonable discretion of the court to allow, or refuse the amended motion.

Except in cases of conviction for felonies, it is not necessary to ask the accused if he has any thing to say why the sentence of the law should not be pronounced on him, when it appears that no prejudice to the accused resulted from not putting the question.

The State vs. *Andrew Bradley et al., 326.*

Where two persons are jointly charged with the commission of a crime, the State is entitled, on a proper showing, to a continuance as to *both*, even though one of the accused is ready for, and demands a trial. *State* vs. *Brooks, 335.*

The defendant who is on trial for murder, can not introduce evidence of the quarrelsome or dangerous character of the deceased, in justifi-

CRIMINAL LAW—*Continued.*

cation; but he may introduce evidence of such character, in excuse for the killing, or in palliation of the offense, provided he first shows he was actually attacked by the deceased, and that he was aware of the latter's character.

In an indictment for murder or manslaughter, the character and nature of the wound which caused the death need not be set forth. The indictment need only charge that defendant did *willfully, feloniously, and of his malice aforethought kill and murder the deceased.*

The State vs. *Augustin Robertson, 340.*

As a general proposition, the question whether an application for a change of venue in a criminal case shall be granted, or refused, is a question which is confided exclusively to the discretion of the lower court.

The charge given by the judge to the jury, in the trial of a criminal case, to the effect that unless it was shown that the killing was done while the deceased and accused were clutched, or in actual combat, it was not done in the heat of passion, but through malice, is fatally erroneous, and will authorize the setting aside of the verdict. The special grade of crime involved in a homicide, is not to be determined by the mere fact that the parties were, or were not, at the moment of the killing involved in an actual struggle, but by other facts showing malice, or the absence of malice.

The State vs. *James V. White, 364.*

Thr trial of a criminal case without any plea having been filed by, or on behalf of the accused, is fatally irregular; and any verdict against the accused, in such a case, will be set aside.

Where the record in a criminal case fails to show that the accused was present in court, at any time from the moment of his arraignment to his sentence, the judgment and verdict against him will be annulled and set aside.

When the entry in the record of a criminal case states that the jury were duly sworn and impaneled, it will be presumed that all of the jurors were sworn, although only eight of them are *expressly* mentioned as having been sworn.

Denunciation of another jury, for having found a wrongful verdict in a different case, (made by the district attorney in the argument of a criminal case,) although objectionable, is not ground for setting aside a verdict.

Indictments charging the crime of larceny, and burglary, may be repeatedly amended during the trial of the case, in order to set forth the names of the real owners of the property charged to have been stolen.

Even after the jury in a criminal case have been impaneled, the state-

CRIMINAL LAW—*Continued.*

ment of defendant's counsel that they would impeach the character of a brother of one of the jurors, who was a witness for the State, may, sometimes, but not always, make it proper for the court to excuse the juror.

Where the accused, who is charged in one indictment with burglary, and grand larceny, has been convicted of burglary, the entry of a *nolle prosequi* as to the charge of grand larceny, will not warrant an arrest of judgment.

The State vs. *Joseph Christian, 367.*

An information for uttering a forged bill is prescribed by the lapse of one year from the time the offense was brought to the knowledge of the officer charged with the prosecution.

Forging a document, and uttering that document are two separate and distinct offenses, and hence the charge of one, in an information, will not include a charge of the other.

When the plea of prescription appears good, on the face of the information, the burden of proof is on the State to show that the plea is not well founded.

The allowance of an amendment to an information, changing the date of the bill charged to have been forged and uttered, allowed during the trial, and after certain admissions of the accused, will not warrant the rejection of the admissions, nor an arrest of judgment, when it appears that no injury to the accused resulted from the amendment.

The State vs. *R. W. Snow, 401.*

The mere fact that the prosecuting attorney in a trial for murder, read to the jury a definition of malice, from a manuscript he refused to allow the attorney for the accused to see, will not authorize a verdict to be set aside when the accused does not allege that the said definition of malice was incorrect, and when it appears that the judge instructed the jury not to regard what was thus read from the manuscript.

When it is shown that a wound which might be fatal has been inflicted by the accused with a murderous intent, then the burden of proof is on him to show that the death of the accused resulted from malpractice, or culpable neglect of the attending surgeon, or from some other cause other than that of the wound.

The State vs. *John G. Briscoe, 433.*

In putting questions to witnesses in a criminal trial it is not permitted to assume as true, facts which have not been proved, and which the jury alone are charged with finding.

One witness can not testify in a criminal trial as to what another witness said on the examination before the committing magistrate, when

CRIMINAL LAW—*Continued.*

that other witness is present in court, and not disqualified, and when it is not sought to contradict him.

The mere fact that an accused when under examination before a magistrate does not rise up and contradict the witnesses who testify against him, does not warrant the implication that he thereby confesses the truth of their statements.

To make the declarations of others evidence against an accused, when made out of his presence, it must be first shown that there was a conspiracy between him and them.

State of Louisiana vs. *Richard Smith, alias Dick Smith*, 457.

When a bill of exception to a ruling of the judge in a criminal trial contains a statement of facts in opposition to his own recollection, and his notes of evidence, he is justified in refusing to sign the bill, and to hear any evidence to contradict his own recollection and notes.

A prisoner has no right, under the law, to a service on him of a list of the talesmen summoned.

The confession of a prisoner, if received in evidence, must be received as a whole; but it is for the jury to determine whether the whole of it, or any part of it is entitled to credit; and if so, how much credit.

To offset his declarations to one person, offered in evidence by the State, the accused has no right to introduce in evidence other declarations of his, made to other persons, unless they were made *at the same time* as those offered by the State.

While this court will review, and consider the evidence taken on a motion for a new trial in a criminal case if brought here by bills of exception, or by affidavits appended to the motion, yet it can not be said that the lower court erred, when such evidence was orally produced, in refusing to have it reduced to writing.

In the interest of justice, this court will sometimes grant a new trial in a criminal case, when no precedent for it exists.

The State vs. *Jacob and David Gunter*, 536.

It is not necessary that an examination of the accused before a committing magistrate should be had, preliminary to the finding of an indictment, or the filing of an information against him.

Under the constitution of Louisiana the prosecution of all offenses, except capital offenses, may be initiated on information filed by the public prosecutor, with leave of the court. This information need not be supported by affidavits.

The amendment of the constitution of the United States requiring the intervention of a grand jury, relates only to crimes cognizable by the United States courts, and to criminal proceedings in those courts.

Where it is charged in an information that a certain instrument, created

CRIMINAL LAW—*Continued.*

by special statute with specific and distinctive features, has been uttered, and falsely published as true, it must be shown, in order to maintain the charge, that the identical instrument thus created, has been thus uttered and published. It does not maintain the charge to prove that *another* instrument has been uttered and falsely published, no matter how close its resemblance to the instrument created by the statute and described in the information.

Before the utterance or publication as true of a certain false and altered instrument can constitute a crime, it must be made to appear that if genuine, it would be evidence of the fact it recites; and that it does, or may tend to prejudice the rights of another.

Where it appears that the utterance and publication as true of a false and altered instrument, can only tend to anybody's prejudice if so uttered and published by the accused in a *certain official capacity*, the failure to charge in the information that the offense was committed by the accused in that official capacity, will render the information fatally defective.

The criminal statutes of this State make it a crime to *alter* a record; they also make it a crime to falsely *publish* as true, an altered record, but there is no such crime known to the law of Louisiana as "uttering and publishing" as true, an altered, false and counterfeited instrument.

The State vs. *Thomas C. Anderson*, 557.

The objection of an accused that the property he was convicted of stealing was imperfectly, and incompletely described in the indictment, should be taken on a motion to quash the indictment, before the jury is sworn. It is too late to urge such an objection, being one apparent on the face of the indictment, on a motion in arrest of judgment. *The State* vs. *Bill Thomas*, 600.

Evidence of an offense different and distinct from that charged in the indictment is only admissible in evidence, where it tends to show the intent with which the act charged was done. Thus where the charge is stealing a certain hog, evidence that the accused altered the mark of the hog is admissible. *Ib.*

One who takes property, or, after having had it in possession for a time releases it, and subsequently retakes it, under a mistaken but honest belief that it was his property, is not guilty of larceny. *Ib.*

When a bill of exceptions is so expressed as to leave in doubt what the lower judge actually charged the jury on some important point, the accused will have the benefit of the doubt, and the case will be remanded. *Ib.*

Declarations of an accused in his own behalf are only admissible when they are a part of the *res gestæ*. *Ib.*

CRIMINAL LAW—*Continued.*

To constitute a part of the *res gestæ* it is not necessary that declarations should be precisely concurrent with the act charged to have been committed; it is only necessary that they spring from it, and are made under circumstances that preclude the idea of design. Thus where one is charged with stealing a certain thing, his declarations that it was his property, made before the alleged stealing, are admissible in evidence. *Ib.*

The addition of the words "with capital punishment" to the verdict of a jury can not affect the verdict. The words are mere surplusage. *The State* vs. *William alias Bedford Burns*, 679.

Proof that a homicide was committed in any of the parishes of this State, is proof that it was committed within the State. *Ib.*

The verdict of a jury in a murder case will not be set aside on the ground that the court below refused to hear evidence to prove the desperate character of the deceased, when there is nothing in defendant's bill of exception to indicate the nature of the evidence offered, except that the deceased was a man of desperate character, and nothing to show in what way that fact affected the prisoner's conduct in the killing. *Ib.*

An information charging defendant with breaking and entering a store at night, with intent to steal, which fails to charge that defendant *feloniously* entered, and fails to charge that he did break, and enter with *burglarious*, or *felonious intent* to steal, etc., is fatally defective. *State* vs. *Curtis*, 814.

No indictment is valid which does not contain an indorsement of the special crime charged, followed by the words "a true bill," and signed by the foreman of the grand jury in his official capacity, in the presence of the grand jury. *State* vs. *Israel Morrison*, 817.

Where a party is tried for perjury, for having sworn in a civil suit that he witnessed the sale of certain property, he has the right to introduce in evidence the judgment of the court in said suit decreeing that said sale had been made, and the reasons for said judgment given by the court. *The State* vs. *Elbert Faulk*, 831.

He has also the right to show by witnesses that said sale took place on a different day from the one he had sworn to, even though the effect of such evidence is to contradict and discredit another witness in the case without having laid the basis for such contradiction. *Ib.*

In criminal cases it is not necessary that there should be any foreman of the jury. Nor is it necessary that the verdict of a jury should be written, or signed. It is sufficient that a member of the jury utters the verdict orally. Nor is it necessary that the verdict should express the name of the prisoner, or the specific crime for which he is condemned. *Ib.*

CRIMINAL LAW—*Continued.*

A verdict of conviction will not be set aside on the ground that the State's Attorney refused to call and examine three witnesses present at the trial of the case, and alleged to be cognizant of all the facts of the case, when there is no averment, in the bill of exceptions that the accused was prejudiced thereby, and when there is nothing to show that he did not have a fair and impartial trial.
The State vs. *Albert Williams*, 842.

The crime of murder can not be prescribed. Time therefore is not of the essence of that offense, and therefore the time stated in the indictment is, in general, not material. *Ib.*

As affecting the question of prescription, as to prescriptible offenses, evidence is admissible to show that the accused was a fugitive from justice, from the time the act charged was committed. *Ib.*

The General Criminal Statute enacted by the Legislature of this State May 4, 1805, did not adopt, as a portion of our law, all the crimes and misdemeanors known to the Common Law at that date. It merely adopted the Common-Law definitions of those offenses declared to be crimes by that act, and incorporated as a part of our system, the Common-Law mode of prosecution as to forms of indictment, method of trial, rules of evidence, and all other Common-Law proceedings in criminal cases. *State* vs. *Henry Smith*, 846.

The crime of incest, although denounced, is not defined by any statute of Louisiana, and hence, there can be no conviction for incest under the laws of this State. *Ib.*

An indictment for larceny which describes the property stolen as "ninety dollars in paper currency of the United States of America," is sufficiently specific. The value of the property need not be alleged. In the absence of proof to the contrary, it will be presumed that a person convicted of crime was properly represented by counsel in the lower court. *The State* vs. *J. Ziord alias J. M. Warren*, 867.

The State must affirmatively show that the confession made by an accused was voluntary. A confession made by a prisoner under any promise of advantage to him, in consequence of it, must be rejected.
The State vs. *Lee Johnson et al.*, 881.

When the record in a criminal case shows that the grand jury came into court and presented an indictment in due form, it will be presumed, in the absence of specific objection and affirmative proof to the contrary, that the grand jury was properly organized.
The State vs. *Washington Tazwell et al.*, 884.

The question whether a person tendered as a member of a petit jury sufficiently understands the English language to try the issues of a criminal case, is a question of fact confided exclusively to the decision of the lower court. *Ib.*

CRIMINAL LAW—*Continued.*

Being under the charge of larceny disqualifies a person from serving as a petit juror. *Ib.*

Because a confession of the accused to a prosecuting witness was made in response to a question put by the witness, the confession is not thereby rendered involuntary. *Ib.*

Where the indictment charges that an offense was committed at a certain hour of a certain night, it is sufficient to prove that it was committed at any hour during the alleged night. *Ib.*

It is not necessary, in order to convict one as accessory before the fact to the crime of burglary, to prove that the instrument he furnished his confederate to commit the offense with was actually used by the latter. *Ib.*

The word "pants," in an indictment for larceny, sufficiently describes a thing which may be the subject of larceny.
The State vs. *Joseph M. Johnson, 904.*

Where the jury in a criminal case bring in a verdict not responsive to any charge in the indictment, it is proper for the court to direct them to retire, and bring in a proper verdict.
The State vs. *George Sales et al., 916.*

An indictment which states that one of the accused did "assist and abet" the killing and murdering, and then charges that he was "accessory before the fact to the killing and murdering," is fatally inconsistent. *Ib.*

The confession made by one of two persons jointly indicted for the same offense, and tried together by the same jury, is not admissible in evidence against any one but himself, no matter whether that confession be made in the course of his address to the judge, or in form of a plea of guilty. *The State* vs. *Ben Weasel et al., 919.*

The verdict of a jury in a criminal case will not be set aside on the ground that while the jury were deliberating on the case, two of the jurors separated from the others on a call of nature, when it appears that they were attended by a deputy sheriff and spoke to no one while they were out. *The State* vs. *John Johnson, 921.*

It is not within the province of the judge presiding at a criminal trial to give such instructions to the jury, after they have returned a valid verdict in the case, as shall lead to a change, or modification of the verdict. *Ib.*

When in a prosecution for murder based entirely on circumstantial evidence, the State finds it necessary, as a link in the chain of that evidence, to trace to the accused a motive for the homicide in his previous quarrel with the deceased, it is competent for the defense to prove facts showing similar, or stronger motives in others to do the same act. *Ib.*

CRIMINAL LAW—*Continued.*

The statement made by an accused, while in prison on the charge of larceny, to the officer in charge of him, that "if you, (the officer), will take me out of jail, I'll turn up the money," is not admissible in evidence against the accused.
The State vs. *William von Sachs et al,, 942.*

In an information charging burglary, and entering a house at night with intent to steal, it is not necessary to give the ownership of the house. *The State* vs. *Paul Clifton, 951.*

Evidence that the accused was seen in the immediate vicinity of the scene of the offense at about the hour he is charged to have committed it, is admissible. *Ib.*

The proper question to put, in order to elicit the reputation for honesty of an accused, is what is the *general* reputation of the accused for honesty, etc.; not what is his reputation with those among whom he dwelt. *Ib.*

When the jury in a criminal case return a defective verdict, the judge may properly so state to the jury, and thereupon instruct them as to the form in which they should clothe their verdict. But to ask them the question whether it was their intention to find the accused guilty of the crime charged in the information, and to have recorded as their verdict the answer thus elicited, is so grave an interference with the functions of the jury, as will warrant the setting aside of the verdict. *Ib.*

When no bill of exceptions is taken to any of the rulings of the lower judge during the trial of an application for a change of venue, his decision on the application can not be reviewed by this court.
The State vs. *John Williams, 1028.*

The clerk of the Criminal Court is not qualified to act as a jury commissioner, under the Act No. 44, approved March 8, 1877, until he has taken the special oath prescribed by that act. His failure to take that oath before participating in the drawing of a jury, vitiates the drawing. *Ib.*

The State has a right to ask the jurors in a criminal case, whether they have conscientious scruples against finding a verdict which would entail capital punishment. *The State* vs. *Sarrazin Baker, 1134.*

A witness in a criminal case may be recalled, even after he has been examined and cross-examined. *Ib.*

On the trial of an accused for murder no specific act of the deceased, unconnected with the killing, is admissible in evidence. *Ib.*

The crime of manslaughter is prescriptible in one year from its commission. *Ib.*

The entering of a *nolle prosequi* by the State's Attorney, on a motion to quash an indictment amounts to a voluntary abandonment of the

CRIMINAL LAW—*Continued.*

prosecution, in which case the indictment will not have the effect of interrupting prescription. *Ib.*

Where the regular venire has been exhausted without completing the jury, it is the duty of the judge, if the accused shall so request, to order the sheriff to call the absent members of the regular panel at the courthouse door before the summoning of talesmen to complete the jury. *The State* vs. *Thomas Ross, 1154.*

It is not necessary that the accused, who is being tried for a felony, should be present in court, whenever any step, no matter how insignificant, is taken in the case. *The State* vs. *Lou. Outs, 1155.*

Oral observations addressed by the judge to the jury after the reading of his written charge to them, and which are not alleged to contain any error, will not furnish ground for a bill of exception when not objected to at the time they were delivered. *Ib.*

In a prosecution for forging a certain instrument evidence is admissible to show that the accused was in possession of the instrument on the day of its date, and that she presented it in payment of goods purchased by her. *Ib.*

Forging an order for merchandise is a crime under the law of this State, and punishable as such. Revised Statutes, § 833. *Ib.*

Where in a criminal case, in which the defendant has waived a jury, the sentence pronounced on the defendant is not responsive to the decree signed by the judge, the judgment will be set aside and the case remanded. *The State* vs. *Ishmael Williams, 1162.*

A criminal prosecution and conviction, based on a fatally defective information, or indictment, will not interrrupt prescription of the crime charged. *The State* vs. *S. W. Curtis, 1166.*

In criminal cases an objection to the ruling of the lower court must be put into the form of a bill of exceptions, and the bill must be filed. Article 488 of the Code of Practice, and the amendment thereof, do not apply to exceptions reserved in criminal prosecutions. *The State* vs. *Wilson Jessie, 1170.*

Where the information charges that the accused wounded another, with intent to commit murder, the jury may find that he was guilty of inflicting a wound less than mayhem, with intent to kill. The verdict is responsive to the charge. *Ib.*

A new trial will be refused unless it be shown that injustice has been done to the accused. *Ib.*

The amendment of an information which charges an "intent to commit murder," to one which charges an "intent to kill and murder" does not make any substantial change in the information. *Ib.*

Where the verdicts returned by a jury are informal, the judge may properly so inform them, and remand them, with additional instructions, to bring in another verdict. *Ib.*

CRIMINAL LAW—*Continued.*

The continuance of a criminal case can not be asked on the ground of the absence of material witnesses, when it is not shown that due diligence was used to secure the attendance of the witnesses.

The State vs. *Thomas Ryan*, *1176.*

The widow is a competent witness to prove the dying declarations of her former husband. *Ib.*

Threats of the deceased against the one on trial for killing him, not shown to have been made in the presence of the accused, or communicated to him, are not admissible in evidence. *Ib.*

It is too late, in a motion for a new trial, to urge objections to the charge of the judge which were not reserved at the time the charge was given. *Ib.*

The charge in an information that the accused was guilty of the larceny of "the sum of twenty-six dollars in current money of the United States of the value of $26," is sufficiently certain, and descriptive, to warrant a conviction.

State of Louisiana vs. *Daniel Monroe*, *1241.*

Carnal intercourse with a female under twelve years of age, amounts, under the law of Louisiana, to the crime of rape. A girl less than twelve years old is incapable of giving consent.

The State vs. *Mike Tilman*, *1249.*

All offenses not capital, may be prosecuted on information.

The State vs. *Cooley Newton et al.*, *1253.*

In an information charging that the defendant did feloniously break into a dwelling-house at night with intent to kill, it is not necessary to charge that he did it "burglariously," or "without being armed," or "without assaulting any person lawfully in the house," or to set forth the name of the person the burglar intended to kill. *Ib.*

The fact that the accused attempted to escape from prison a few days before his trial, on a charge of murder is admissible in evidence. The time of the attempt is not material, as bearing on the question of its admissibility.

The State vs. *James Beatty, alias Wm. Brown, et al.*, *1266.*

The State may introduce evidence to prove contradictory statements made by the defendant's witness at another time. *Ib.*

Unsworn statements made after the trial of a criminal case by one of the jurors in the case, going to impeach his own verdict, or to show misconduct in the jury, are not admissible in evidence on the application for a new trial. *Ib.*

When, on the application of the counsel of an accused on trial for murder, the judge promises to put his charge to the jury in writing, and up to the close of the trial has failed to do so, the mere fact that the counsel for the accused renounced his right to a written charge,

CRIMINAL LAW—*Continued.*

for fear that the additional delay necessary to enable the judge to write out his charge might prejudice the jury against the accused, will not impair the right of the accused to a new trial on the ground that the judge failed to give the written charge.

The State vs. *James Swayze*, 1323.

This court will grant new trials in criminal cases, but only on pure questions of law. *Ib.*

The charge of the judge in a criminal case that "where the killing is proved, malice is presumed by the law from the fact of killing," is erroneous. It is from the surrounding circumstances, and not from the act of killing that malice is to be inferred, and to be inferred by the jury, and not, as an implication of law, to be applied by the court. *Ib.*

The State has no right, on cross-examination of the defendant's witness, to question the latter as to any fact not connected with the matters stated by him in his direct examination. *Ib.*

The judge presiding at a criminal trial has no authority to state in the hearing of the jury, that a certain explanation given by a witness for the State "was a most important and material explanation." *Ib.*

In order to convict a person, indicted under section 795 of the Revised Statutes of 1870, for biting off an ear, it must be shown that a sufficient portion of the ear was maliciously severed from the body of the injured person by the accused, to attract observation, and impair comeliness. *The State* vs. *Moses Harrison*, 1329.

No appeal can be taken in a criminal case after the expiration of the term of court during which the sentence in the case was rendered. *The State* vs. *William Harris*, 1340.

CUMULATION OF SUITS.

See Practice and Pleading.

CURATOR AD HOC.

Except in cases of attachment, where the law fixes the fee of a curator *ad hoc*, the court can not, *ex parte*, assess and order to be paid the fees of such an officer.

State ex rel. Louisiana Board of Trustees for the Blind vs. *the Judge of the Sixth District Court*, 1026.

DAMAGES.

Where the evidence shows that the plaintiff, who was injured by a collision with a railroad car, contributed by his own fault to bring about the collision, he can not recover damages from the railroad company on account of the injury, even though the employees of the company were partly in fault.

Christian Schwartz vs. *the Crescent-City Railroad Company*, 15.

DAMAGES—*Continued.*

If the party who has contracted to deliver a certain thing at a fixed price makes a tender of it at the proper time, and the party who has contracted to receive the thing refuses to receive it, the former may recover from the latter whatever damages are proved to have directly flowed from the latter's breach of contract.

Bartley vs. *City of New Orleans, 264.*

Whoever claims damages, based on a deprivation of prospective profits, must establish such facts in evidence as will enable the court to fix with certainty the amount of the deprived profits. *Ib.*

Where in an action for damages on account of injury done to certain property, the decree of this court merely declares that the defendant is responsible for certain damages, it does not amount to a judgment for the amount of those damages in favor of the plaintiff, who has neither alleged, nor proved that he was the owner of the injured property. In such case the defendant is entitled to allege, and to introduce any pertinent evidence to prove the nature, and limitations of the plaintiff's rights in the injured property; and in no event can he be held for a greater proportion of the damages than the nature and extent of the plaintiff's rights in the property would equitably entitle him to claim. *Burbank* vs. *Harris, 487.*

Neither the heirs of a deceased wrongdoer nor his widow in community can be held liable in vindictive damages for any wrong committed by him, when no suit for damages has been instituted before his death. The measure of their liability, in such cases, is the actual damage done to the person or property of the sufferer.

Hillary Edwards vs. *Wm. Ricks et al., 926.*

Before a party can be held in damages for failing to do what he has contracted to do, he must be put in default by a written demand, or a verbal demand in the presence of two witnesses.

State ex rel. Schwing vs. *Fontelieu, 1125.*

On the dissolution of an injunction issued at the instance of a *curator ad hoc*, damages will not be allowed against the absent plaintiff; nor against the curator representing him, when it appears that the curator acted conscientiously.

Cobb vs. *Richardson, Sheriff, 1228.*

The owner of a plantation is not liable for damages to an adjoining plantation caused by works erected on his own plantation, in order to prevent its inundation by a destructive overflow of the Mississippi river; more especially when the owner of the adjoining place refused to co-operate in a common work for the protection of both places. *E. E. Mailhot* vs. *Robert Pugh, 1359.*

One can not claim indemnity for damages which he has contributed to bring about by his own negligence, or culpable indolence. *Ib.*

DATION EN PAIEMENT.

See Giving in Payment.

DEDICATION TO PUBLIC USE.

If it appears from a scrutiny of all the provisions of an act of donation *inter vivos* that it was the real intention of the donor, and of the donees, that the land conveyed by the act should be dedicated to public use, such land will be held as thus dedicated.

Police Jury of the Parish of Plaquemines vs. *Foulhouze et al.*, *64.*

Property dedicated to public use is not liable to seizure and sale.

Property held by a municipal corporation in trust for public uses can not be alienated by the corporation, nor subjected to seizure and sale by any of its creditors. *Ib.*

Where a certain tract of land has been dedicated to public use—the whole of it remains thus dedicated, although only a part has been actually put to public use. Nor is this dedication at all impaired because a part of the land has been temporarily leased to private individuals. *Ib.*

Land which has been donated to a parish and dedicated to public use, can not be seized for any debt due by the parish.

Howard McKnight vs. *the Parish of Grant*, *361.*

DEFAULT.

See Contracts and Damages.

DEFAULT—JUDGMENT OF.

See Judgments.

DEPOSITARY.

A depositary may show by parol evidence that the money deposited with him, and for which he had given his written receipt, was composed of certain bank bills.

Uranie Bérard vs. *Vincent Boagni*, *1125.*

A depositary is not liable for any depreciation in the value of bank bills deposited with him, unless it appears that the depreciation has proceeded from his fault, or has occurred after he was in default to restore the deposit. *Ib.*

DOMICILE.

When a party has made no declaration of residence, as provided for in article forty-two of the Civil Code, the proof of fact and intention, as regards the question of domicile, is left to the circumstances of each case. *Evans and Husband* vs. *Payne & Harrison*, *498.*

Where a defendant resides alternately in different parishes, without having made a declaration of residence, he must be cited where he appears to have his principal establishment or habitual residence. If his residence in each parish, appears to be nearly of the same nature, he may be cited in either parish, as the plaintiff may elect. *Ib.*

DOMICILE—*Continued.*

A party can not be compelled to appear and answer to a suit brought against him in any other district court but that of the parish of his domicile.

State ex rel. Thomas W. Nelson vs. *Alexander V. Fournet, Assessor, et al., 1103.*

DONATIONS INTER VIVOS.

A donation *inter vivos* of movable property can only be made in two ways: by act before a notary and two witnesses, or by actual manual delivery; and one who claims a movable in virtue of a donation, must prove that the donation was specifically made, in one or the other of those two ways.

Mrs. Mary E. Kirkpatrick, Wife of O'Brien, vs. *Finney & Byrnes et al., 223.*

One who has made a donation *inter vivos* of immovable property to his concubine, can not, on the latter's death, recover the property, on the ground that the donation violated a prohibitory law, and was opposed to good morals.

Robert Monatt vs. *E. T. Parker, Public Administrator, 585.*

When the condition on which a donation was made has not been complied with, the donation may be revoked, whether the property donated be in the possession of the donee, or of a transferee of the donee. *Eskridge* vs. *Farrar, 718.*

ERRORS OF LAW.

See Contracts.

ESTOPPEL.

Whoever by word or act, purposely persuades another that a certain state of things exists, which induces him to act so as to alter his previous position, is estopped from denying the existence of that state of things. *Montague et al.* vs. *Weil & Bro., 50.*

The owner of property which has been illegally seized under a *fi. fa.* and offered for sale, will forfeit his claim for damages on account of the illegal seizure, if he himself has so acted as to countenance the sale of the property under such seizure. *Bevens* vs. *Weill, 185.*

The drawee is not estopped from disproving erroneous statements made by him to the holder of a draft as to the amount of the drawer's funds in his hands, or as to the extent of his claim on those funds, when his statements have not induced the holder to alter his position to his prejudice. *Marqueze & Co.* vs. *Fernandez & Co., 195.*

The allegation of a plaintiff in a suit to recover property, (alleged to be unlawfully in the defendant's possession) that he had bought the property, but had never paid for it, and hence that it still belonged to the vendor, is not a disclaimer of title, which can be pleaded by

ESTOPPEL—*Continued.*

defendant in estoppel, in a subsequent suit to recover the property, brought by the legal representative of the plaintiffs.

Mary M. Pendegast, Administratrix, vs. *Geo. Schawtz et al.*, *590.*

A defendant can not dispute the title of the person under whom he holds. *Ib.*

Defendants, (having been sued in a corporate capacity), after appearing in their corporate name, and filing an exception and an answer, and plea in reconvention, are estopped from disputing their corporate capacity.

John K. Jones vs. *Trustees of the Congregation of Mount Zion*, *711.*

Parties are estopped from denying admissions or declarations deliberately made by them in judicial proceedings.

Walter C. Compton vs. *William L. Sandford*, *838.*

When the owner of an immovable is present at a public sale of the same, and tacitly assents to its being sold as the property of another, he is thereby estopped from subsequently disputing the title and possession of the *bona fide* purchaser.

M. H. Lippmins vs. *A. McCranie*, *1251.*

A party who in one suit set up a title of ownership to certain property, is not thereby estopped from afterward claiming mortgage rights on the property, as against one who in the former suit denied, and contested his title as owner, and who was in no way injured, or induced to change his position by the claim of ownership set up in the former suit.

John Chaffe & Bro. vs. *Joseph Morgan. J. P. Shultz, Intervenor*, *1307.*

EVIDENCE.

Extracts from the judgment of another court are not admissible in evidence, in order to show the force and effect of the judgment. A certified copy of the entire judgment, together with all the pleadings that led up to it, must be put in evidence.

Gest & Atkinson vs. *N. O., St. Louis, and Chicago Railroad Company*, *28.*

Where the validity of a wife's title to property bought by her during marriage is assailed, and the property is claimed by the husband's creditors as community property, the wife may prove by parol evidence that the property was purchased by her with her separate funds. *Succession of Pinard* vs. *Holten et al.*, *167.*

Testimony given by a witness in one trial can not be introduced to impeach his evidence given in a subsequent trial, unless a proper foundation for it is laid by stating to the witness, at his examination on the second trial, what he had testified on the former trial. *Ib.*

EVIDENCE—*Continued.*

Prima facie, the sale, or *dation en paiement* of property, made by a debtor to his creditor, to pay a debt much smaller in amount than the value of the property transferred, at the time when the property is in imminent danger of being seized by the sheriff in favor of a lessor, is fraudulent; and the burden of proof is on the party claiming under such sale, or *dation*, to prove its *bona fide* character.

Robert Worrell vs. *James H. Vickers*, 202.

Under the allegation of fraud, or simulation, touching a transfer of property, every surrounding circumstance bearing on the transfer is admissible in evidence, and will be considered in passing on the character of the assignment. *Ib.*

Whether the journals of the Houses of the Legislature are admissible in evidence to prove that a certain act was passed in disregard of the constitutional forms necessary to give it validity as a law, is an open question before this court.

Choppin & Beard vs. *Louisiana Levee Co.*, 345.

Dying declarations made by a deceased person under a sense of immediate and impending death are admissible in evidence.

The State vs. *Judge Spencer*, 362.

Until traversed and disproved, the declarations of the sheriff in his return on a writ of *fi. fa.* are taken to be true.

Pinard vs. *George*, 384.

Parol evidence is admissible to prove the transfer to a third person of a legatee's interest in a succession.

State ex rel. Hartwell vs. *Jumel, Auditor*, 422.

This court will presume that the seal used by one, who styles himself, without contradiction, a commissioner of Louisiana, in authenticating an affidavit made before him, as commissioner, was the seal of a commissioner of Louisiana, until the contrary is clearly, and specifically shown to this court.

Tunstall vs. *the Parish of Madison*, 471.

Documents annexed to and incorporated with the answers filed by a garnishee are thereby properly in evidence, as part of his answers.

Meyer vs. *Deffarge*, 548.

Answers of a garnishee are a part of the pleadings, and are before the court without the necessity of being formally offered in evidence.

Ib.

Quære.—Whether the consolidated statement, or returns of a supervisor of registration might not be receivable in evidence in an *election* contest as secondary, or even as the best evidence, in the absence or loss of the returns of the commissioners of election.

State vs. *Anderson*, 557.

The holder of a duly paraphed mortgage note, on which certain credits

EVIDENCE—*Continued.*

are indorsed, is entitled to proceed by executory process for the balance of the note, against the mortgaged property, and the purchaser of the property, whose assumption of the payment of the note appears by a notarial act of mortgage containing the pact *de non alienando.* If such purchaser has gone into bankruptcy, and is represented by an assignee, the certificate of a register in bankruptcy is sufficient evidence of the assignee's appointment and acceptance. *Dobel* vs. *Delavallade*, 604.

When a bond sued on is, from the manner of its indorsement, payable to bearer; or the defendant tacitly acknowledges the title of the plaintiff; or no adverse title is pleaded, or suggested in the printed argument of defendant's counsel; or when defendant merely pleads the general issue, the genuineness of the signature to the bond is thereby admitted, and no proof of the payee's indorsement is necessary. *Lesassier & Binder* vs. *the Board of Liquidation*, 611.

When an act under private signature is permitted to be read in evidence, without objection, proof of its execution is waived. *Ib.*

When no statement of facts, showing what evidence was introduced on the trial of the case below, is submitted to this court, it will be presumed that the judge *a quo* proceeded on proper evidence.
The State vs. *H. S. Nicol, Jasper Bowman, et al.*, 628.

Parol evidence, even when not objected to, is not admissible to prove that the owner of real estate agreed that it should be sold as the property of a third person. *Logan* vs. *Herbert*, 727.

Where a *dation en paiement* by a husband to his wife is attacked, after the wife's death, as fraudulent, the husband is a competent witness for the wife's succession, to prove the amount, and verity of his wife's claims against him.
Lehman, Abraham & Co. vs. *Levy*, 745.

The contents of a judgment may be proved by parol, when the loss of the court records containing the judgment has been accounted for.
Sharkey vs. *Bankston*, 891.

A contract of mandate for the purchase of real estate can not be proved by parol evidence, even when fraud in the alleged agent is set up.
Fritz Hackenburg vs. *Mrs. C. Garstkamp, Tutrix, et al.*, 898.

Extra judicial admissions and confessions of a party can not be proved by parol, in a case where testimonial proof is inadmissible. *Ib.*

The contents of a written promise, or admission can not be proved by parol, until its destruction, or its loss, and proper efforts to recover it, have been shown. *Succession of Woods*, 1002.

Parol evidence is admissible to prove that a written contract was signed under the influence of force or violence.
Moore & Coleman vs. *Rush*, 1157.

EVIDENCE—*Continued.*

He who contends that he is exonerated from an obligation on which he is sued, must prove the payment, or the fact which has extinguished the obligation. *M. L. Scovel* vs. *V. M. Gill*, 1207.

The testimony of a party to a suit may be taken under commission, like that of any other witness.
McLear & Kendall vs. *Succession of J. L. Hunsicker*, 1225.

Evidence in proof of a claim is admissible, although it may appear, *prima facie*, that the claim is prescribed.
Succession of J. W. Zacharie, on Opposition of City of New Orleans et al., 1260.

The fact that tax-bills have been filed in court is not proof that suit has been brought on them. *Ib.*

The question of simulation when put at issue in any case, will be determined by a review of all the surrounding facts.
N. Fass vs. *Rice Bros. & Co.*, 1278.

The husband is incompetent to testify in a suit brought by the wife for a separation of property. *Willis* vs. *Ward*, 1282.

An order of seizure and sale may issue on a note and mortgage when neither has any United States internal revenue stamps on it. Neither the allegation nor proof of a previous demand for payment, or presentment at a particular place is necessary to obtain executory process, although the note is payable at such a place, when the note is secured by mortgage importing a confession of judgment.
Pargoud vs. *Richardson*, 1286.

Parol evidence is inadmissible to prove a promise to pay the debt of a third person. *Hamilton et al.* vs. *Hodges et al.*, 1290.

The ratification of a contract can only be deduced from facts, when those facts evince clearly, and absolutely, the intention to ratify.
Ib.

A bill of exceptions need not be taken to the rulings of the court in civil suits. It is only necessary to note the exceptions in the note of evidence. *Lafayette Fire Insurance Co.* vs. *Remmers*, 1347.

A party objecting to evidence offered in the court below must see that the objections are stated in the note of evidence; otherwise this court will not consider them. *Ib.*

EVIDENCE ON APPEAL.
See Appeal.

EVIDENCE IN CRIMINAL CASES.
See Criminal Law.

EXCEPTIONS.
See Practice and Pleading.

EXECUTION OF JUDGMENTS.

An adjudication of property under a judgment subsequently annulled by a regular decree of court, conveys no title.

Billgery vs. *Ferguson*, 84.

Where property, within the parish of Orleans, has been seized by the sheriff under a writ of *fi. fa.* and remains in his hands unsold until the return day of the writ, he must, in order thereafter to legally hold the property, and thus maintain on it the lien acquired to the creditor by his seizure, make due return of the writ on its return-day, and cause the clerk of the court to make and give to him a duly certified copy of the writ, within twenty-four hours after the return of the original. Otherwise, the sheriff will be without authority thenceforth to maintain the seizure. *Ib.*

Where the attorney of the plaintiff in execution instructs the sheriff to make a return of *nulla bona*, it relieves the sheriff from the necessity of calling on the plaintiff to point out property of the defendant.

Pinard vs. *George*, 384.

A seizure under *fi. fa.* of property bearing rents includes a seizure of the rents. *Summers & Brannins* vs. *Clark*, 436.

When the sheriff makes a return of a writ of *fi. fa.* under which he has seized certain property after the return-day of the writ, and retains a copy of the writ, written by himself, it is not necessary that he should append to the copy his certificate of its correctness, in order to enable him to make a valid sale of the seized property. Under such circumstances, the return of the writ after its return-day will not affect the validity of the sale. *Briant* vs. *Hebert*, 1127.

An appellant in whose favor a certain sum of money has been awarded by the judgment of the lower court, may at any moment abandon his appeal, and enforce the judgment appealed from.

Eliza Snider et al. vs. *W. N. Collins, Sheriff, et al.*, 1236.

Where two creditors holding the promissory notes of their debtor secured by one mortgage on the latter's plantation, sue on their notes and obtain personal judgments, and each seizes under a *fi. fa.* the crop grown on the plantation, and the proceeds of the crop are held (under an agreement between the seizing creditors which makes no mention of any privilege or pledge on the crop claimed by either creditor) to await the adjudication of their claims under their seizures, the creditor making the first seizure will acquire a preference. *Edward J. Gay & Co.* vs. *Francis W. Pike*, 1332.

EXECUTORS.

See Administrators.

EXECUTORY PROCEEDINGS.

See Seizure and Sale.

EXEMPTIONS—FROM TAXATION.

See Taxation.

EXEMPTIONS—FROM SEIZURE.

The exemptions of property from seizure provided for by article 644 of the Code of Practice, and by the acts of 1872 and 1874, do not apply in favor of lessees, as against their lessors.

Duncan Stewart vs. *Charles Lacoume, 157.*

A partnership is not within the language or intendment of the exemption law, and hence none of the property of a partnership is exempt from seizure.

White & Barret vs. *Wm. Heffner, Sheriff, et al., 1280.*

FACTORS.

See Principal and Agent.

FAMILY MEETING.

See Succession.

GARNISHMENT AND GARNISHEES.

Lands situated in another State can not be seized in a garnishment proceeding instituted here.

George W. Bancker vs. *W. Harrington & Co. et al. Temple S. Coons & Co,, Intervenors, 136.*

Where a garnishee sets up in his answers, that the judgment debtor's one third interest in the property seized in the garnishee's hands was sold and transferred to a third person before interrogatories were served on him, a subsequent judgment annulling the sale of the seized property as simulated, and fraudulent, will not render the garnishee liable for the whole amount of the judgment creditor's debt, but only for the value of the debtor's interest in the seized property. *Meyer* vs. *Deffarge, 548.*

GIVING IN PAYMENT.

A fixed *price* is as essential to the validity of a giving in payment, as it is to a sale. *Lovell* vs. *Payne, 511.*

A *dation en paiement* of property unaccompanied by its delivery, is void.

Queyrouze & Bois vs. *Thibodeaux, 1114.*

A *dation en paiement* made by a father to his children, by which he divests himself of all means of support, is void. *Ib.*

A *dation en paiement* made by a debtor which leaves him nothing with which to pay his other debts, thus making him insolvent, is void.

Ib.

GUARANTY.

Where the language of a guaranty addressed to a factor is, "I am willing to go his security for the amount of twenty-five hundred dollars," it is not what is termed a *continuing* guaranty. It only embraces the first $2500 of money advanced, or goods furnished to the person in whose favor the guaranty is given. The factor thus guar-

GUARANTY—*Continued.*

anteed is legally bound to apply to the guaranteed debt, and for the discharge of the guarantor, the first payments received by him from the person in whose favor the guaranty was given.

Ben Gerson vs. *G. W. & G. M. Hamilton*, 737.

HABEAS CORPUS.

The power of this court to issue writs of habeas corpus being confined to cases when we may have appellate jurisdiction, although no appeal be actually pending, it follows that we can not issue such a writ in a case where no fine has been imposed, and the sole proceeding in which the writ is asked is a sentence of the lower court condemning the petitioner to imprisonment for contempt.

James Wood to the Court, 672.

HOMESTEAD.

Where a necessitous widow dies, without having received her portion of $1000, under the act of 1852, her *major* heirs can not claim that portion from the husband's succession. Only her children, and her remoter descendants, who are *minors* and necessitous, are entitled to claim such portion.

Succession of John Durkin, 669.

Minors under the tutorship of their father do not come within the terms of the homestead act.

Duncan Greig, Tutor, vs. *H. Eastin, Sheriff, et al.*, 1130.

Property held in indivision can not be the object of a homestead right.

Ib.

The homestead law of 1865 does not give to the family of a debtor any such rights in his property as will prevent him from making valid confessions of judgment on debts that are prescribed.

W. C. Martin vs. *H. W. Kirkpatrick, Sheriff, et al.*, 1214.

Homestead laws exempting property from seizure and sale are wholly inoperative and void as to debts created before the passage of such laws.

Ib.

HUSBAND AND WIFE.

A transfer or donation to his wife of furniture, or other property made by an insolvent husband is, *prima facie*, fraudulent and simulated; and such property may be seized by the husband's creditors, and if seized, the burden will be on the wife to prove the real, and the *bona fide* character of the assignment.

Kirkpatrick vs. *Finney & Byrnes et al.*, 223.

The validity of a *dation en paiement* made by the husband to the wife, to satisfy a judgment obtained by the wife against him, will not be impaired by the fact that the judgment was a mere consent one, resting on no evidence, when it is shown *aliunde* that the wife's claims, on which the judgment purported to rest, are legal and real;

HUSBAND AND WIFE—*Continued.*

such for example, as claims for her dotal, or paraphernal effects, alienated by the husband.

Lehman, Abraham & Co. vs. *Levy*, 745.

Neither the pecuniary embarrassment, nor the actual insolvency of the husband, is any obstacle to a transfer by the husband to the wife, in good faith, for the replacing of her money, or property, used, or alienated by him. *Ib.*

A judgment of separation of property between husband and wife which is not executed is utterly null and void. *Ib.*

The failure of a wife to execute a judgment of separation of property, which she has obtained, will not impair or prejudice any claim she may have against her husband. *Ib.*

It will be assumed that the property transferred by the husband to the wife, to replace her dotal or paraphernal effects, is fairly appraised in the act of transfer, until the contrary is shown by the party attacking the transfer. *Ib.*

HYPOTHECARY ACTION.

The prayer of a petition that the sale of a certain immovable be declared void, and that the property *quoad* the plaintiff's rights be decreed to belong to a certain third person, will not, in the absence of any demand for a seizure and sale of the property, constitute the action an hypothecary one. *Logan* vs. *Hébert*, 727.

The hypothecary action can not be maintained unless the evidence shows that amicable demand on the debtor for the payment of the hypothecary debt was made in a formal manner, thirty days previous to bringing the suit. *M. L. Kelly* vs. *G. M. Sandidge et al.*, 1190.

The creditor who brings the hypothecary action must declare on oath that the debt is really due him, and that he has demanded payment of his debtor thirty days previous to bringing the suit. *Ib.*

IMPUTATION OF PAYMENT.

SEE PAYMENT.

INJUNCTION.

A judgment dissolving an injunction bars the plaintiff from obtaining a subsequent injunction, on any of the grounds in existence prior to the judgment of dissolution, and of which he could have availed himself on the trial of the first injunction.

E. C. Porter vs. *Pierre Morère et al.*, 230.

Matters that could have been urged by way of defense, on the original trial of a case, and on appeal from the judgment in the case, afford no grounds for enjoining the execution of that judgment.

John O'Connor et al. vs. *Sheriff et al.*, 441.

The object of such a suit is not to enjoin the judgment of the district court, but merely to prevent an alleged unauthorized person from

INJUNCTION—*Continued.*

executing it. In a suit like this the dissolution of the injunction might work irreparable injury to the plaintiffs, and other heirs and creditors of the succession, and hence, if properly issued, should not be dissolved on the bond of the defendant; more especially, when the amount of that bond is too small to protect the property of the succession from spoliation and waste.

Brown vs. *Brown*, *506.*

The dissolution of an injunction issued to restrain an order of seizure and sale, (in a case where no allegation is made of defect or nullity in the judgment ordering the seizure and sale) leaves nothing more to be decided in the injunction suit, and hence, the court may properly order it to be stricken from the docket.

Wade vs. *Loudon and Sheriff*, *660.*

On the trial of motions to dissolve injunctions not issued against money judgments, damages are not to be allowed. The defendants in such injunctions are left to their recourse on the bonds.

Crescent City Live-Stock Landing and Slaughter-House Company vs. *John Larrieux. The Same* vs. *John Gisch et al.*, *740.*

It is only where a judgment for money has been enjoined that damages can be awarded on the dissolution of the injunction.

Morris vs. *Bienvenu*, *878.*

A defendant in injunction, on complying with the law, may have the injunction set aside in every case where its dissolution will not work irreparable injury to the plaintiff.

Jefferson and Lake Pontchartrain Railway Co. vs. *City of New Orleans*, *970.*

Minors will be held in damages only for the actual expenses of a defendant in injunction, caused by a wrongful injunction sued out by their tutor. *Greig* vs. *Eastin*, *1130.*

Damages will not be granted on the dissolution of an injunction when it is not certain that the plaintiff wilfully used the writ for delay, or merely to harass the creditor.

Williamson vs. *Richardson*, *1163.*

One who claims a privilege on certain property has no right, merely on the ground of his having a privilege, to enjoin the foreclosure of a mortgage on the property.

A. H. Van Loan vs. *Wm. Heffner, Sheriff*, *1213.*

A judgment debtor against whom a final judgment has been rendered, can not enjoin the execution of the judgment on the ground that the mortgage on which the judgment was based had perempted before the judgment was rendered. As to him, the question of peremption is *res adjudicata.*

John A. Haynes vs. *J. B. O'Neil, Sheriff, et al.*, *1238.*

INSOLVENCY.

The purchaser of property, sold in fraud of his creditors by an insolvent debtor, who pays by anticipation a part of the nominal price after the institution of a suit to annul the sale on the ground of fraud, is not entitled to be refunded the sum he has thus paid.

Schmidt & Zeigler vs. *Caleb Sandel et al.*, *353.*

Where an insolvent merchant, pressed by creditors, nominally sells to his penniless clerk a stock of goods which the clerk and he know are not paid for, and accepts in payment of the goods a debt for pretended wages he owes the clerk, and the promissory notes of the clerk, the transaction will be considered a fraudulent simulation.

Sattler & Co. vs. *Leonard Marino*, *355.*

A *dation en paiement* made by an insolvent debtor to one of his creditors is fraudulent, and may be set aside. *Lovell* vs. *Payne*, *511.*

The return of a writ of *fieri facias* against a party, unsatisfied, is evidence of his insolvency. *Ib.*

Every fraudulent act of a creditor, no matter what its form, may be attacked by any creditor who has been prejudiced by it. *Ib.*

The mere fact that a creditor accepts the voluntary surrender of his debtor will not stop interest from running on his debt, or divest any pledge he may have.

Mrs. Mary F. Blouin et al. vs. *Liquidators of Hart & Hébert*, *714.*

A pretended sale by an insolvent debtor to one of his creditors, will be set aside on the petition of any other creditor.

Johnson vs. *Mayer*, *1203.*

INTEREST.

A judgment can not allow interest that the plaintiff has not claimed.

Brown vs. *Bessou*, *734.*

In the absence of a written agreement by the defendant to pay eight per cent per annum interest, only legal interest can be recovered.

Bayly & Pond vs. *Stacey & Poland*, *1210.*

Only legal interest will be allowed when a larger interest is not stipulated in writing. *Buckley* vs. *Seymour*, *1341.*

INTERVENTIONS.

See Practice and Pleading.

JUDGE AD HOC.

See Judges.

JUDGES.

A party is not eligible as District Judge who has not practiced law in this State for two years, next preceding his election.

State ex rel. Fred. Duffel, District Attorney pro tem., et al. vs. *Morris Marks*, *97.*

JUDGES—*Continued.*

In legal contemplation, a party can not be said to have practiced law, even though, as a matter of fact, he may have done so, if he has not previously qualified to practice, by complying with the requirements prescribed by the constitution.

Because one has acted as district attorney, he can not be said, in a constitutional sense, to have "practiced law." *Ib.*

Where an injunction is asked for in a case that comes within the jurisdiction of the District Court, and the District Judge is absent, and the parish judge is legally recused, the parish judge of an adjoining parish may grant the injunction.

John A. Klein vs. *E. M. Cramer, Sheriff, et al., 372.*

When a parish judge is recused in any case on the ground of personal interest, he can not appoint a lawyer to try the case in his stead.

Succession of S. M. Hyams, 460.

The fact that a wife of the judge is one of the parties to the suit is sufficient to recuse him on the ground of personal interest, whether she be separate in property from him or not. *Ib.*

When a judge has acquired his office, in the mode prescribed by the constitution, he has a vested right to its emoluments, during the term fixed by the constitution for its duration, and his right can not be impaired by an act of Legislature, passed during said term, abolishing the office.

State ex rel. Collens vs. *Jumel, Auditor, 861.*

It is not a just ground of complaint that the court below, in charging the jury that they were judges of the law and the evidence, added the words that, "if they thought they knew more of the law than the judge, it was their privilege to so believe."

State vs. *Johnson, 904.*

When the father of the probate judge is a creditor of a succession, and joins the administrator in the petition for a sale of the succession property, the judge may properly recuse himself from passing on the application for an order of sale. In such a case the judge *ad hoc* should sign the order of sale. *Succession of Lacroix, 924.*

The fact that a justice of this court was of counsel for certain parties in two former suits, is no ground for his recusation in a subsequent suit in which the same parties are litigants, when it appears that the validity of none of the proceedings, and the decision of none of the questions involved in the previous suits, are put at issue in the subsequent suit. *Stewart* vs. *Mix, Sheriff, 1035.*

A district attorney who is a practicing lawyer, is qualified to act as judge *ad hoc* in the trial of a civil case in which the judge is recused.

State ex rel. Valery Coce vs. *J. A. Chargois, 1102.*

JUDGES—*Continued.*

A lawyer who having accepted the appointment of judge *ad hoc* to try a case, and entered on the trial, afterward refuses to go on with the trial, can not be compelled by mandamus to proceed with the case. *Ib.*

JUDGMENTS.

A judgment of the lower court which dissolves an injunction, and which passes definitively on all the essential points at issue between the parties, is a final judgment from which an appeal will lie to this court. *Bertrand Saloy* vs. *Amos S. Collins*, 63.

But a judgment is incomplete until signed by the judge who rendered it, and hence, until thus signed, this court can not take cognizance of an appeal from it. *Ib.*

The unexplained use of the words "without prejudice," in a judgment dissolving an injunction, will not convert the decree into a mere judgment of nonsuit. *Porter* vs. *Morère et al.*, 230.

Until a definitive judgment, rendered by a court of competent jurisdiction, has been set aside, either on appeal or by an action of nullity, money paid under it can not be recovered.

First Presbyterian Church vs. *City of New Orleans*, 259.

The signature of the judge to any final decree rendered by him, is absolutely necessary to constitute it a judgment. Mere entries of judgment on the minutes of a court, unsigned by the judge of the court, are not judgments.

State ex rel. C. C. Hartwell vs. *Allen Jumel, Auditor*, 421.

In order to recover judgment the plaintiff must prove his case. *Ib.*

The decree of the lower court will not be disturbed on the ground of its alleged non-conformity to evidence not submitted to the inspection of this court. *Succession of D. P. Jackson*, 463.

An acceptance of service, and waiver of citation authorize a judgment of default to be taken before the expiration of the ordinary ten days delay from the service of citation.

Evans and Husband vs. *Payne & Harrison*, 498.

Consent judgments are not binding on third persons, and therefore any third person sought to be affected by such a judgment, has a right to show its character. *Carroll & Co.* vs. *Hamilton*, 520.

A judgment can have no effect on the rights of those not parties to it, and who had no notice of the legal proceedings which led up to the judgment. Thus a mortgage creditor may proceed in a district court against the mortgaged property, without regard to the fact that the property had been sold under a judgment, to which he was not a party, rendered by a parish court, in a suit brought after the institution of the proceedings in the district court.

E. J. Barkdull, Tutor, vs. *E. F. Herwig and Mrs. C. Smith*, 618.

JUDGMENTS—*Continued.*

If the last of the ten days allowed a defendant for answering falls upon a *dies non*, the whole of the next day is given to him to file his answer; and any judgment of default taken against him before the expiration of that day, is premature.

John H. Catherwood & Co. vs. *Wm. H. Shepard*, 677.

A case will be remanded on the ground of newly discovered evidence filed in this court, whenever it shall appear that the ends of justice demand it. *Wilberga Schneider* vs. *Etna Life Insurance Co.*, 1198.

The reasons given by the court for its judgment in a particular case form no part of the judgment, and hence can not be invoked as *res adjudicata* in a subsequent suit between the same parties.

Chaffe & Bro. vs. *Morgan*, 1307.

JURISDICTION.

See Courts.

JURIES.

One who has not resided within the parish in which a certain case is tried, for one year next preceding the trial, is not qualified to serve as a juror in that case.

The State vs. *Alonzo Brooks and John Brooks, Sr.*, 335.

No legal grand jury for the parish of Orleans nor petit jury for the Superior Criminal Court of said parish could be drawn after April 2, 1878, except from a panel of jurors drawn in accordance with the act of the Legislature passed the said second of April, providing for the drawing of grand and petit jurors.

State ex rel. Ephraim Maurice vs. *Judge of Superior District Court*, 603.

JUSTICES OF THE PEACE.

See Courts.

LAW OF NATIONS.

So long as a government exercises sway over a territory, and has the physical power and means to enforce obedience, the civil acts of its officers are valid and legally binding. *Sharkey* vs. *Bankston*, 891.

LAWS.

An act of the Legislature which leaves to creditors the ordinary legal remedies for the enforcement of their rights, and merely restrains them in certain cases from employing the summary process of mandamus, does not violate the constitutional provision that every injured person shall have adequate remedy by due process of law, and without unreasonable delay.

State ex rel. Strauss vs. *Brown*, 78.

A fine or penalty imposed by a State law, to be exacted by the magistrates of a municipal corporation for the use of the corporation, is not a fine or penalty imposed by the corporation.

State ex rel. Geale vs. *Recorder of the First Recorder's Court*, 450.

LAWS—*Continued.*

The Legislature may constitutionally confer on the officers of a municipal corporation the right to take judicial cognizance of cases arising under the police regulations and laws of the corporation.

The State and Town of Plaquemines vs. *Chas. Ruff*, 497.

An act of the Legislature authorizing a municipal corporation to sue for and recover, before its mayor, a fine for the breach of one of its police regulations, does not authorize the arrest and criminal prosecution of one who commits such a breach. *Ib.*

Where the exemption from taxation fixed by law applies equally, and uniformly to all tax-payers, it can not be said to contravene the constitutional requirement of equality, and uniformity of taxation.

City of New Orleans vs. *Davidson & Hill*, 554.

The law authorizing the judges of certain district courts in the parish of Orleans to appoint commissioners to select competent men to serve as jurors, does not violate any clause of the constitution limiting the courts to the exercise of purely judicial functions.

State vs. *Anderson*, 557.

Under the act regulating elections in this State, enacted in November, 1872, the "consolidated statement of votes made by a supervisor of registration," is not evidence of the result of any election. *Ib.*

Where the repealing clause of a law expressly repeals certain designated sections of the Revised Statutes, and in general terms repeals *all* laws in conflict with it, it will have the effect of repealing every previous act, identical with any one of those expressly repealed.

State ex rel. J. H. Rills vs. *David N. Barrow*, 657.

All laws are considered promulgated the day after their publication in the State gazette, or in thirty days thereafter, according to locality. The act of the Legislature adopting the "Revised Statutes" of this State, was legally promulgated. *Ib.*

The party who alleges that a law has not been promulgated must prove it. *Ib.*

The Legislature is empowered to form a contract, to pay an annual rent for buildings necessary for the use of the State; and its power to buy a State-House is equally unquestionable, if the debt thereby created does not exceed the constitutional limitation.

Charles A. Harris vs. *Antoine Dubuclet, State Treasurer*, 662.

A legislative act, which, after appropriating a certain sum for a certain legal purpose, payable in annual installments, provides that "out of all State taxes collected, one half of one mill on every dollar shall be set apart of the general funds as a fund to meet" said sum, does not violate the third amendment of the State constitution, devoting the revenues of each year, (except surplus revenues) to the expenses of that year. The effect of such an act is merely to dimin-

LAWS—*Continued.*

ish the general-fund tax by the amount it levies for the purposes contemplated in the statute. *Ib.*

The act of the Legislature imposing an additional license tax on saloon keepers who give singing and dancing entertainments, in conjunction with their occupation of selling liquors, does not violate the constitutional requirement of equality and uniformity of taxation.
State vs. *Becker*, 682.

The act of the Legistature passed at the extra session of 1877, abolishing the office of Park Commissioners of the New-Orleans Park, and transferring all of their powers and duties to the Common Council of New Orleans, did not have the effect of extinguishing by confusion any judgment which said commissioners had obtained against the said city, or of relieving the Common Council from providing for its payment, in the manner pointed out by law.
State ex rel. Carondelet Canal and Navigation Co. vs. *Edward Pilsbury, Mayor, et al.*, 705.

When there is any conflict between the provisions of the Revised Statutes of 1870, and those of the Civil Code, as revised that year, the latter shall prevail.
Peet, Yale & Bowling vs. *Nalle & Cammack*, 949.

In the interpretation of a law the motive of the lawmaker, and the meaning and scope of the law, may be sought for in contemporaneous history, in the discussions attendant on the progress of the legislation, and in subsequent legislation on the same, or on cognate matters.
State ex rel. New-Orleans Pacific Railway Co. vs. *Nicholls, Governor*, 980.

Until the actual debt of the State has reached the limit of $15,000,000, it is competent for the Legislature to provide for the issuing of bonds as a loan to such enterprises as fall within its constitutional power, provided that in the act creating the debt, adequate ways and means are provided for the payment of the current interest, and of the principal when it shall become due. *Ib.*

The act of the Legislature of March 11, 1878, authorizing the issue of bonds of the State in aid of the New-Orleans Pacific Railway Company is not repugnant to the constitutional provision prohibiting aid to a private purpose. *Ib.*

The law imposing a smaller license tax on proprietors of bars or drinking saloons, kept on steamboats owned and registered in this State, than on the owners of bars kept on land, does not violate the clause of the constitution prescribing equality, and uniformity of taxation.
The State vs. *Charles Rolle*, 991.

LAWS—*Continued.*

The act 129 of the Legislature of 1877, touching the recusation of judges, is not in conflict with the constitution of the State.

State ex rel. Schwing vs. *Fontelieu, 1122.*

Where the act of the Legislature authorizing a loan of the State's credit on the security of a certain mortgage, is silent as to the question of the appraisement of the property covered by the mortgage, in case of its forced sale, it will be assumed that the Legislature designed that such a forced sale should only take place after the usual appraisement provided for by law.

State ex rel. New-Orleans Pacific Railroad Co. vs. *Nicholls, 1217.*

The act No. 37 of the extra session of the Legislature of 1877, regulating the sale of coal oil, petroleum, etc., prescribing penalties for the infraction of the act, and delegating to the Board of Health the authority to enforce the law, does not violate article 114 or article 118 of the constitution of the State; or that provision of the constitution of the United States giving to Congress the power to regulate commerce between the States; or that provision forbidding any State to lay any impost or export duty except what may be necessary to the execution of its inspection laws. Act No. 37 is an inspection law. *James G. Clark* vs. *the Board of Health et al., 1351.*

So much of section second of the act No. 41 of 1877 as provides "that all judgments for drainage of said lands, judgments creating liens and for assessments for drainage of said lands, and all proceedings pending therefor, be and they are hereby canceled and annulled," and so much of the first and second sections of said act as exclude certain lands from the limits of the drainage district and exempt them from all future drainage assessments, impair the obligations of existing contracts and are unconstitutional.

The New-Orleans Canal and Banking Company vs. *the City of New Orleans, W. Van Norden, Intervenor, 1371.*

The Legislature can not so alter the charter of a corporation as to affect the rights of third persons previously acquired under the charter.

LAWYERS. *Ib.*

In fixing the compensation for the professional services of a lawyer in any particular case, there are two considerations which will determine the judgment of this court. One is the character and amount of the work done, and the other is the ability of the debtor to pay.

Breaux, Fenner & Hall vs. *Justus Francke, 336.*

LEGACIES AND LEGATEES.

Accretion only takes place in favor of legatees, in cases where a legacy has been left to "several conjointly;" as specially provided for in articles 1707, and 1708 of the Civil Code.

Succession of Dougart, 268.

LEGACIES AND LEGATEES—*Continued.*

A mere right of usufruct, no matter how general the usufruct, will not constitute the usufructuary a universal legatee, or even a legatee under a universal title; but only a legatee by a particular title. *Ib.*

It is only when a legatee by a particular title is charged with the payment of a special legacy, that he can profit by the lapse of the legacy. *Ib.*

When parties, who have been instituted by a last will as universal legatees, or legatees under a universal title, assume the quality of such legatees, they become bound for the debts of the succession, and—saving the case of reduction—for the payment of the particular legacies. *Eskridge* vs. *Farrar*, 718.

Heirs and universal legatees are personally bound, in proportion to the share each inherits, to pay the particular legacies. But they are bound only to the extent of the effects of the succession, and hence they may free themselves from paying the legacies by abandoning to the legatees, after the payment of debts, the effects of the succession. *Ib.*

LESSOR AND LESSEE.

The lessor's right of pledge can not be impaired by a sale of the property subject to that pledge, collusively made by the lessee to one of his creditors, and removed from the leased premises with the fraudulent intent of defeating the lessor's privilege. *Worrell* vs. *Vickers*, 202.

Any doubt as to the intentions of the parties to a contract of lease, arising out of uncertain terms of the contract, will be construed in favor of the lessee. It is the business of the lessor to have the agreement expressed in clear and certain terms. *E. H. Murrell* vs. *Mrs. Serena Lion and Husband*, 255.

Where the contract of lease leaves it doubtful whether the lease is to terminate on the first or the thirty-first of a certain month, the lessee may elect which of the two dates it shall end on. *Ib.*

Where the condition of a contract of lease is that if either party desires to terminate the lease he must give notice of his intent *one month* before the first of the succeeding October, and it happens that the first of the succeeding September falls on Sunday, notice served the second of September will satisfy the condition. *Ib.*

Where a lessee continues in possession after the expiration of the lease, without a renewal of the contract, there is a tacit reconduction of the lease by the month, terminable on fifteen days' notice. *Ib.*

Where the lease of a store-house is taken in the *name* of one person, but is really taken, with the full knowledge, and consent of the

LESSOR AND LESSEE—*Continued.*

lessor, for the exclusive use and benefit of a third person, such third person will be deemed the real lessee.

J. G. E. Aurich vs. *Geo. G. Wolf & Levi, 375.*

The property of a party who, to the knowledge and with the consent of the lessor, is the real, although not the nominal lessee, can not be seized under a writ of provisional seizure issued in the suit against the nominal lessee, and directed solely against the property of the nominal lessee. *Ib.*

A judgment creditor who seizes under execution leased property belonging to his debtor, and held by the lessee under a lease *not recorded*, becomes entitled to, and may exact from the lessee all the rents thereafter accruing from said property; and the fact that the lessee has executed and delivered to the debtor his negotiable promissory notes covering the rent to become due for the whole of the unexpired term of the lease, will not exonerate him from liability to the seizing creditor, for the rents accruing subsequent to the seizure.

Summers & Brannin vs. *James S. Clark, S. L. Boyd, Garnishee, 436.*

Where the former lessee of property is sued by his former lessor, for damages to the property alleged to have been caused by the fault of the defendant during the term of the lease, the defendant may contest the former lessor's title to the property; and to recover in such a suit, the plaintiff must prove that he was the owner of the property. *Ophelia G. Burbank, Tutrix,* vs. *William Harris, 487.*

LIBEL.

A stipulation made by the vendee of a newspaper to pay "all of the outstanding liabilities" of the paper will not make the vendee liable for the damages for libel subsequently recovered against the vendor, in a suit pending when the sale of the paper was made.

L. C. Perret vs. *Alice King, 1363.*

LICENSES.

See Taxation.

LITIGIOUS RIGHTS—PURCHASE OF.

One who purchases a claim which he knows to be in suit, and legally contested, is entitled to recover on it only what he paid for it, with legal interest from the date of its transfer to him.

Ann L. Spears vs. *W. L. Jackson, Administrator, 523.*

LOUISIANA LEVEE COMPANY.

Under the acts of the Legislature which set forth the terms of the contract made by the State with the Louisiana Levee Company, the company are bound to construct, or repair, or strengthen in any given year only such levees, as the commission of engineers, created

LOUISIANA LEVEE COMPANY—*Continued.*

by those acts, shall require, and furnish estimates of the work of, before the first of October of the preceding year: and to maintain every *completed* section of the levee, up to the standard dimensions prescribed by the commission of engineers. One who claims damages of the company therefore, for injury caused by a crevasse at any given point on the levee, must, in order to set forth a *prima facie* cause of action, allege that the company failed to build, or repair the levee at the crevasse point after having been directed by the engineers to do it, or, had not done the work according to the standard fixed by the engineers; or, that the crevasse had occurred at some point on a completed section of the levee, where the standard dimensions prescribed by the engineers had not been maintained by the company; or, that on account of the imperfection of the work, the crevasse occurred when the water was below the standard height fixed by the engineers.

Choppin & Beard vs. *Louisiana Levee Company.* 345.

MANDAMUS.

A mandamus will not issue to compel a public officer to perform a ministerial duty, when the evidence shows that the performance of that duty by him is a physical impossibility; or that his ability to carry out the mandate of the court depends on the co-operative action of a third person who is not before the court.

State ex rel. Pierre Lacaze et al. vs. *Chas. Cavanac, Administrator of Commerce,* 237.

The prayer for a mandamus is too vague which merely asks that an officer shall be compelled to accomplish a certain result. The relator must designate the specific acts which he demands that the respondent shall do. *Ib.*

The holder of a claim against the State, the amount of which is fixed by law, may compel the Auditor by mandamus to warrant for the amount, unless the latter shows that no appropriation was made for its payment, or that the appropriation was exhausted, or that the claim exceeded the revenue of the year in which it was exigible.

State ex rel. Samuel vs. *Jumel,* 339.

It is the duty of the treasurer of the parish to register and he may be mandamused to register the claims of the sheriff for all expenses incurred by him on account of the arrest, confinement, and maintenance of persons accused of crime, and for *all* expenses whatever attending criminal proceedings, when the amount of such claims shall have been certified to as correct by the clerk of the court and the presiding judge thereof, and presented to the treasurer for registry within sixty days thereafter. But the treasurer is not bound to register claims for services, or expenses not rendered, or

MANDAMUS—*Continued.*

incurred in criminal proceedings, not even if certified to as correct by the clerk and presiding judge.

State ex rel. Barrow, Sheriff, vs. *Fisher, Treasurer*, 514.

SEE STATE EX REL. CARONDELET C. & N. CO. VS. CITY OF N. O., 705.

One who has a claim against the State for a salary, or for money due on other accounts, is entitled to have his right to payment adjudicated by means of a mandamus against the auditing officer.

State ex rel. T. Wharton Collens vs. *Allen Jumel, Auditor*, 861.

It is discretionary with the Attorney General of the State to proceed, on his own motion, to bring suit for the forfeiture of the charter of a corporation, and hence he can not be compelled by mandamus to institute such a suit.

State ex rel. Lannes vs. *Attorney General*, 954.

A mandamus will not issue to compel the parish assessor, and tax collector to assess a tax. Only the police jury of a parish have power to levy a tax. *State ex rel. Nelson* vs. *Fournet*, 1103.

Although it is proper that proceedings for a mandamus should be taken in the name of the State, yet the absence of that form will not be fatal, when the facts set forth in the petition disclose a right to the writ, and there was a proper prayer for it.

J. A. & E. A. Morris vs. *J. W. Womble, Sheriff*, 1312.

MANDATE.

SEE PRINCIPAL AND AGENT.

MARRIAGE.

Their own public and expressed consent, and the consent of their master, were alone sufficient to give validity to a marriage between slaves in Louisiana, and from the moment of their emancipation such a marriage has secured to them and their posterity all the rights and privileges bestowed by the State on marriages authorized and sanctioned by its laws. *Succession of Henry Pearce*, 1168.

Where a man introduces a woman to his friends as his wife, calls her his wife, and he and she live together publicly as man and wife until her death, and their children, born while they are thus living together, are baptized, reared and educated as their legal offspring, the law will presume that they had been lawfully married, and that their children are legitimate, until it is shown that no marriage between them ever took place, or that it was void on account of some nullity established by law.

Blasini vs. *Succession of Blasini*, 1388.

MARRIED WOMEN.

Property purchased during marriage by the wife, in her own name, with her separate money, which she has always kept, the administration

MARRIED WOMEN—*Continued.*

of which has never been under the husband's control, is her paraphernal property, and can not be seized by any of the husband's creditors.

Succession of H. Pinard vs. *Peter Holten et al., on Opposition of Mrs. Holten, 167.*

The omission to state in the act of sale to a wife, of property bought by her during marriage, that it was bought with her paraphernal funds does not prejudice her title or increase the burden of proof which the law imposes on her in the vindication of her title. *Ib.*

Profits derived during marriage from the use of paraphernal funds under the control of the wife, are paraphernal. *Ib.*

A wife is sufficiently authorized to take an appeal when her husband joins her in the petition for it.

Boutté et al. vs. *Executors of Boutté, 177.*

The mortgage note of a wife knowingly received by a creditor of the husband, in satisfaction, or security of the husband's debt, is, in the hands of such a creditor, utterly null and void.

Claverie vs. *Gerodias, 291.*

A wife, although separate in property, can not be held on her mortgage note, when the holder of the note fails to show that she was authorized by the judge to make the mortgage, and fails to show that her pretended agent, who made the mortgage was empowered by her to do it, and also fails to show that the consideration of the note inured to her separate benefit. *Nugent* vs. *Stark, 492.*

The declaration made by a wife and her husband in a written contract that a certain plantation was her property, is not invalidated by the fact that she was a married woman.

Mrs. Caroline Forrester et al. vs. *Moses Mann, 542.*

Contracts made by a married woman personally, or by her authorized agent, for supplies and overseer's wages for the benefit of her separate plantation are, if recorded, binding on the crops grown on the plantation that year. *Ib.*

A wife separate in property from her husband, who is insolvent, is liable, not merely for supplies furnished to her, either in person or to her son or husband, and on her exclusive credit, for the use of her plantation, but also for household expenses, and those for the education of her children. But she is not liable for her husband's debts, or for items of indebtedness not contracted by her, and which neither inured to her benefit, nor were legitimate household expenses. *Acquilla McElvin* vs. *Mrs. Elizabeth M. Taylor et al., 552.*

A married woman will not be bound by her mortgage note executed by her authorized agent, when it appears that she was not authorized by the judge of her domicile to empower the agent to execute such

MARRIED WOMEN—*Continued.*

a note, unless the holder of the note shows affirmatively that the consideration of the note inured to her separate benefit.

M. M. Ada Calhoun vs. *Mechanics' and Traders' Bank*, 772.

To maintain a proceeding *via executiva* against the property of a married woman, in virtue of a mortgage executed by her agent, either the act of the judge authorizing her to so empower the agent, or her ratification of the agent's act after she became a [illegible] or the fact that the debt inured to her separate benefit, must appear in evidence in the form of an authentic act, or of a judgment of some competent court. *Ib.*

A parish judge has no power to authorize a married woman to contract a debt for more than $500.

Mary Stuffler vs. *Eliza J. Puckett*, 811.

Where the wife has not been judicially authorized to give a mortgage on her separate property, a note and mortgage executed by her are not legal proof of her obligation, and evidence *aliunde* showing that it was her separate debt, must be produced in order to bind her. *Ib.*

Unless the wife accepts the community expressly, or tacitly, she stands in relation to its debts as she does toward the debts of third persons. *Ib.*

Even in cases where a married woman has executed her note and mortgage on her property to secure it, under the authorization of the judge, she may prove by parol evidence that the note and mortgage were obtained by fraud, and that their consideration was a debt of her husband. *Henry Barth* vs. *Mrs. Louisa Kasa*, 940.

The proceeds arising from the sale of property belonging to the wife, collected by the administrator of the deceased husband, belong exclusively to her, and do not enter into the husband's succession.

Succession of Quin, 947.

A married woman may enjoin the execution of a judgment against her, when the ground of the judgment was a debt of her husband, even though she failed to set up that defense in the suit in which judgment was obtained. *Bowman* vs. *Kaufman*, 1021.

The failure on the part of a wife to prosecute an appeal she had taken from a judgment against her on account of her husband's debt, will not estop her from subsequently contesting the legality of the judgment. *Ib.*

A married woman, even though separate in property, can not be held liable for a debt contracted by her husband, unless it be affirmatively shown that it inured to her separate benefit. *Ib.*

Where a wife, authorized and assisted by her husband, purchases property in her own name, and the same is ever afterward given in to the tax collectors by her and her husband as *her* property, and the

MARRIED WOMEN—*Continued.*

husband authorizes and assists her to execute a mortgage on the property, as *her* property, to secure a separate debt of hers, the husband is thereby estopped from setting up any title to the property, to the prejudice of a judgment creditor of the wife.

C. S. Stewart vs. *F. P. Mix, Sheriff, et al., 1036.*

Neither the wife nor her separate property can be held liable for supplies furnished to her husband for the cultivation of her plantation, unless it be proved that the wife herself cultivated her plantation, or that it was cultivated for her account and benefit. The mere fact that the creditor kept the account for the supplies against the husband as agent of the wife, does not prove the agency.

Van Wickle vs. *Violet and Wife, 1106.*

A wife, even separate in property, is incapable of either buying or selling property, unless her husband concurs in the act, or yields his consent in writing.

Edward Foreman vs. *W. G. Saxon et al., 1117.*

A married woman duly authorized but not coerced by her husband, who executes a mortgage on her property to secure the payment of her own debt, is bound by the mortgage.

Moore & Coleman vs. *Mary F. Rush, 1157.*

A married woman is not estopped from disproving the averments of an authentic act executed by her, and which she alleges she was forced to sign. *Ib.*

Under the charter of the Citizens' Bank of Louisiana married women may become stockholders, and as such may lawfully mortgage their property, and bind themselves conjointly and *in solido* with their husbands. And they may validly renounce their rights on their husbands' property in favor of the bank, when their husbands own its stock. *Gillaspie* vs. *Citizens' Bank of Louisiana, 1315.*

MARITAL FOURTH.

See Widows.

MASTERS OF VESSELS.

The commander of a steamboat has a right to use whatever reasonable and lawful force may be necessary to maintain a proper police of his vessel, and discipline among his employees.

Mary Johns vs. *Henry J. Brinker, 241.*

Where an employee on board of a steamboat, by her own insolence, insubordination, and threats of personal violence, provokes the captain of the boat into an assault with his hands, resulting in but a trifling injury to her, she will not be entitled to recover in damages. *Ib.*

MECHANIC'S LIEN.

See Privilege.

MINORS.

See Tutors.

MORTGAGES.

No mortgage has any effect as to third persons unless recorded; and save in the single case of the minor's mortgage on the property of the tutor, *every* mortgage ceases to have effect, except as to the parties to it, unless re-inscribed in ten years from the date of its original inscription. Neither the existence of the pact *de non alienando* in a mortgage, nor the pendency of a suit to enforce the mortgage obviates the necessity of its inscription, or its re-inscription.

Watson vs. *Bondurant*, 2.

A mortgage primarily without any consideration given to secure certain negotiable notes in the hands of any future holder, becomes a valid mortgage in favor of any innocent third person who may acquire one of the notes before its maturity, and for value.

Billyery vs. *Ferguson*, 84.

The legal mortgage on a person's property resulting from the registry of his official bond as sheriff, is extinguished by prescription, unless re-inscribed within ten years from the date of said registry. The necessity of a re-inscription every ten years, applies to *all* mortgages, except those specifically exempted from that necessity.

Succession of W. D. Gale. On Opposition of Wm. Sadler, 351.

The clause in an act of mortgage fixing the fees of the creditor's attorney at five per cent in the event of the non-payment of the debt at its maturity, makes the debtor, on the happening of that event, absolutely liable for that amount; and this liability can not be affected by the fact that the creditor has not really paid, or obligated himself to pay that amount of attorney's fees.

Renshaw vs. *Richards*, 398.

The nullity of the principal debt annuls the mortgage securing it.

Chatenond vs. *Hebert*, 404.

Before a mortgage created by an alleged agent can be enforced, it must be proved that the alleged agent was specially authorized to make the mortgage.

Mrs. Alpha P. Nugent vs. *Mrs. Dora L. Stark et al.*, 492.

A mortgagee who transfers part of the mortgage debt to another, can not compete with his transferee for the proceeds of the mortgaged property, where the amount is not sufficient to satisfy both.

Barkdull vs. *Herwig and Smith*, 618.

The registry of a judgment against a party will operate as a legal mortgage on all the immovables of that party situate within the parish wherein the judgment is registered, whether the deed to such immovables is recorded or not; and such mortgage is good against every body that the judgment debtor's title to the immovables is good against.

Logan vs. *Hebert*, 727.

MORTGAGES—*Continued.*

The owner and mortgagor of property sold for taxes, can not buy it in, and thus acquire a title to the prejudice of the mortgagee.
Renshaw vs. *Stafford*, 853.

The mortgagee's rights on the property will remain in full force.
Ib.

The setting aside, for any cause, of the sale of an immovable made by a debtor to his creditor who had a mortgage on the immovable, will not impair any legal rights on the property which the creditor had in virtue of his mortgage. *Chaffe & Bro.* vs. *Morgan*, 1307.

Inscriptions of mortgage can only be erased by the consent of the parties to the mortgage, or by the effect of a decree to which the mortgagee is a party. *Ib.*

NULLITY OF JUDGMENTS.

No valid judgment can be given in a proceeding wherein no citation issued to, and no answer, or appearance was made by the defendant. *Woolfolk* vs. *Woolfolk*, 139.

A judgment rendered against a party who was not cited, and who has not put in an appearance, is null and void.
Victor Laurent vs. *A. J. Beelman and F. M. Beelman*, 363.

A final judgment on default, signed by the judge *in chambers*, is absolutely void. Such a judgment, to be valid, must be read, and signed, in open court. *Ib.*

NULLITY OF SALES.

Where the property of a succession is sold by a mortgage creditor under executory process, without making the succession a party to the proceedings, and no fraud is shown, and it appears that the money was applied to the debts of the succession, the heirs can not annul the sale, and recover the property, without tendering to the innocent purchaser of the same, the price he had paid for it.
Edmund Brown vs. *Emile Bouny et al.*, 174.

Even when it is shown that the expressed consideration of a transfer does not exist, the contract can not on that account be invalidated, if the transferee proves that there was another legal, and sufficient consideration. *Brown, Administrator*, vs. *Brown*, 966.

OBLIGATIONS.

A party can not be held liable for the value of property, stolen on account of its being exposed to theft by an act of his which he had the legal right to do. *Gettwerth* vs. *Hedden*, 30.

A creditor holding the mortgage note of a third person as collateral security, is compelled to credit the debt due him with only the net sum he was legally able to collect on said notes.
Blouin vs. *Liquidators of Hart & Hebert*, 714.

OBLIGATIONS—*Continued.*

When neither error nor fraud is alleged by parties, they can not be relieved from the legal effects of their own acts, and declarations.

Eskridge vs. *Farrar*, 718.

OFFICERS.

Where an act of the Legislature makes a new law for the assessment of property, and a new Board of Assessors are appointed under that law, whose pay is conditioned on their doing the work of assessment, and they actually do the work *they* will be entitled to the appropriation made for the compensation of such assessors, and not any previous Board of Assessors who were *functi officio* when the work of assessment was done.

State ex rel. Geo. E. Paris vs. *Allen Jumel, Auditor, etc. E. C. Payne et al., Intervenors*, 235.

The mere failure of a party who has been elected to a constitutional office to qualify within thirty days from the date of his commission, can not be construed into an abandonment of the office.

State ex rel. Sam Lisso vs. *W. P. Peck*, 280.

The failure of a district attorney *pro tem.*, who has been elected by the police jury of his parish, to qualify within the legal delay, creates a vacancy, which can only be legally filled by appointment of the Governor. *State ex rel. Rills* vs. *Barrow*, 657.

The Auditor can not be compelled to warrant on the Treasurer in favor of any officer of the State, for any sum beyond the appropriation made by the Legislature for such officer.

State ex rel. Collens vs. *Jumel, Auditor*, 861.

When an act of the Legislature, creating an office, takes effect from its passage, the term of the office will commence to run from the passage of the act, in the absence of any provision in the act to the contrary. *The State ex rel. Daniel Wilson* vs. *E. T. Parker*, 1182.

OFFICES—AND VACANCIES IN.

See Officers.

PARAPHERNAL PROPERTY.

See Married Women.

PARISH OBLIGATIONS, AND POWERS OF POLICE JURIES.

Where an act of the Legislature authorizes a parish to issue its bonds for a certain purpose, in such form and denomination as the police jury of the parish shall prescribe, the police jury must specially authorize the issue of the bonds, and the bonds must be signed by persons designated by the Legislature; and in default of this action of the police jury and this signature of the bonds, all bonds issued under color of said legislative act are invalid.

State ex rel. E. Rabasse vs. *Police Jury of Terrebonne Parish*, 287.

PARISH OBLIGATIONS, ETC.—*Continued.*

When a law directs that certain bonds of a parish shall be signed by a majority of the members of its police jury, it means a majority of the members designated by the jury. It does not mean any majority of its members, not selected for the purpose by the jury. *Ib.*

The police jury of a parish have no power to issue its warrants, or paper of any kind, negotiable or otherwise, for any purpose, unless specifically authorized to do it by the Legislature, and the means of paying the debt are provided for in the ordinance creating it.

J. P. Smith vs. *the Parish of Madison, 451.*

Neither the registry by the treasurer of an account against the parish, nor its indorsement by him under the statute, amounts to the issuance of scrip, or negotiable obligations of the parish.

State ex rel. Barrow, Sheriff, vs. *Fisher, Treasurer, 514.*

The fact that no money is in the parish treasury when a proper claim for registry is presented to the treasurer is no reason why the claim should not be registered. *Ib.*

An ordinance of a police jury, passed prior to April 20, 1877, imposing a parish tax of over four mills on the dollar for general parochial purposes, and not afterward sanctioned by the vote of a majority of the taxpayers of the parish, is illegal.

Gonzales vs. *Lindsay, 1085.*

The ordinance of a police jury imposing a fine on persons between certain ages for failing, or refusing to work on the public roads, is constitutional.

Parish of St. Martin ex rel. Baker vs. *Delahoussaye, 1092.*

Property situated within an incorporated town, and the inhabitants of the town, are subject to the imposition of property and license taxes by the police jury of the parish, unless specially exempted by some act of the Legislature. *Parish of Iberia* vs. *R. A. Chiapella, 1143.*

Before a parish can recover the amount of a tax imposed by its police jury, it must show that an estimate of the parish expenses for the current year was made, and published at least thirty days before the assessment of the tax. *Parish of Lincoln* vs. *Huey, 1244.*

The police jury of a parish have authority to impose any license tax they may see fit to impose on trading boats trading within the parish. *Parish of Plaquemines* vs. *John Bowman, 1403.*

PARTITION WALLS.

Where the owner of a vacant lot in the city of New Orleans, who desires to erect a building of certain dimensions on the lot, finds that the wall of his neighbor's house, which is built up to the boundary line of the lot, is so thin that the weight of his prospective building, although erected within the bounds of his own lot, would destroy his neighbor's house, he has the legal right to take down the neigh-

PARTITION WALLS.—*Continued.*

boring wall, and replace it by one strong enough to support the building he shall erect. Such reasonable care must be observed by him however, as will render the inconvenience and loss to his neighbor as small as practicable; and his care must be proportioned to the risk of loss and inconvenience to his neighbor that his undertaking may occasion; and he is liable for whatever actual damage his neglect to take such care may entail.

George L. Gettwerth vs. *Mrs. E. Hedden, 30.*

PARTITION.

The immovable property of a succession, even though partly owned by minors, may be sold for less than its appraised value, to effect a partition among co-heirs, or co-proprietors.

Ventress vs. *Brown, 1012.*

PARTNERSHIP.

The assignment of its assets for the benefit of its creditors, made by a defunct partnership to an individual member of a new partnership succeeding to the former business of the old concern, will not make the new partnership liable to the defunct partnership for the value of any of its assets, and therefore not amenable to a garnishment at the suit of any creditor of the defunct concern.

Bancker vs. *Harrington & Co. et al., 136.*

The mere fact that one member of an ordinary, planting partnership is entrusted with the management of the plantation, will not authorize him to make a *dation* in payment of certain property of the partnership to one of the partnership creditors, and thus place the interest of his copartner, in said property, beyond the reach of other creditors of the partnership.

Alfred S. Bass vs. *Wm. R. Messick, Sheriff, et al., Alcus Scherck & Autey, Intervenors, 373.*

Where the evidence shows that the two individual signers of a merely joint note were, at the date of the note, commercial partners, and that the consideration of the note was money borrowed for, and used by the partnership, each of the makers will be liable on the note *in solido.* *Mitchell* vs. *D'Armond, 396.*

Where a non-resident commercial firm make an agreement with two resident firms, in virtue of which agreement one of the resident firms is to purchase certain merchandise, and ship it in the name of the other, and the other resident firm, with the money of the non-resident firm, is to pay for the merchandise, and each of the resident firms agree to receive, instead of fixed sums in payment of their services, certain proportions of the profits to arise from the subsequent sales of the merchandise, and also agree to share in any losses resulting from said sales,

Held: That such an agreement will not make the said firms commercial

PARTNERSHIP—*Continued.*

partners, even as to third persons, when it appears that they did not *intend* to form a partnership, and that they have not held themselves out to the world as partners.

Chaffraix & Agar vs. *John B. Lafitte & Co.*, 631.

No valid judgment can be rendered against any of the individual members of a former commercial partnership, who have not been cited, on the confession of an agent of the former firm, made after the dissolution of the firm. Such a judgment is null and void.

Edward Conery vs. *Rotchford, Brown & Co.*, 692.

When one partner sues the other for a liquidation and balance due on partnership account, the defendant can not set up in reconvention, damages to the business of the partnership caused by the bad habits of the plaintiff. *Mills* vs. *Fellows*, 824.

In the absence of express agreement a charge by one member of an ordinary partnership against the other, for keeping *the books of the firm* is inadmissible. *Ib.*

The individual members of a commercial firm may execute a valid note, and a valid mortgage securing said note on their individual property, in favor of the firm, and any third person acquiring the note from the firm, in good faith, for value, and before maturity, may enforce its payment.

Pike, Brother & Co. vs. *Hart & Hébert*, 868.

Where a loan is made by two members of a commercial firm, in a matter foreign to the business of the firm, and in disregard of the express opposition of the third member, the two members making the loan are justly chargeable with its amount.

David G. Cooke vs. *Hugh and Andrew Allison*, 963.

A promissory note executed in the name of a certain commercial firm, in liquidation, by an agent of one of the former partners, after the dissolution of the firm, is not binding on the former members who have not given any specific authority for the execution of the note.

Dodd, Brown & Co. vs. *John Bishop & Co. et al.*, 1178.

Where a creditor of a former commercial firm sues its individual members for goods sold to the firm, and declares in his petition on the itemized account of the goods, and also on a promissory note of the firm, given in liquidation of the account by one not authorized to sign for the firm, he will be entitled to recover for the goods, on the unopposed proof of their sale and delivery. *Ib.*

One who acts in such a manner as to induce others to believe that he is a member of a certain partnership, makes himself liable to them as a partner. *Ib.*

An ordinary partnership can not be held liable for the individual debt of one of its members because of an agreement to that effect between

PARTNERSHIP—*Continued.*

that member and his creditor, unless it be proved that the member was authorized to make the agreement by his copartners, or that his agreement was ratified by them, or that the partnership was benefited by the transaction.

W. E. Hamilton et al. vs. *Nellie Hodges, Tutrix, et al., 1290.*

PAYMENT.

Payments made by a debtor without special instructions as to their imputation, will be imputed in accordance with the tacit agreement of the parties as disclosed by their dealings and correspondence.

McLear & Kendall vs. *Succession of Hunsicker, 1225.*

A debtor who receives, without objection, an account current from his creditor which imputes payments made by him to the less onerous part of his debt, is held to ratify by his silence the imputation of payment made in the account. *Ib.*

Where the debts are of like nature the imputation of payments is made to the debt longest due. *Bloom & Co.* vs. *Kern, 1263.*

PLEDGE.

There can be no valid pledge of a mortgage, or vendor's privilege, by mere agreement of parties to that effect, unaccompanied by an actual or symbolical delivery of possession.

Sevin & Gourdain, in Liquidation, vs. *Théogène Caillouet, 528.*

The fact that the stock of a corporation is only transferable on the books of the company, does not prevent a stockholder from validly *pledging* his stock, by merely delivering to his creditor the *certificates* of his stock. A transfer of the stock on the books is not necessary to perfect the pledge. *Blouin* vs. *Liquidators of Hart & Hebert, 714.*

A consignee who has made advances on cotton shipped to him has a right of pledge on it, and its proceeds, for the re-imbursement of those advances; and until the debt due for those advances is paid he is not bound to accept, or pay any drafts drawn on him by the consignor against said cotton at, or about the time it was shipped, in favor of a third person who had discounted the drafts for the consignor, and thus enabled the latter to buy the cotton shipped to the consignee. *Thos. E. Helm et al.* vs. *Meyer, Weis & Co., 943.*

It is not necessary to record a pledge to make it effective as to third persons, where the object of pledge comes into the actual possession of the pledgee before any conflicting lien has attached to it. *Ib.*

Where the pledgee of a mortgage note, in whose hands it has been placed to secure a debt due him by the pledgor, sells the property mortgaged to secure the note for a sum less than the amount of the note, and immediately resells it for a larger sum than that of the note, he becomes liable to the pledgor, not for the price at which the property was resold, but merely for the amount of the note. *Mrs. A. R. Richardson* vs. *Moses Mann, 1060.*

POLICE JURY.

See Parish Obligations, and Powers.

PRACTICE AND PLEADING.

To confirm a judgment by default, involving the assessment of damages, a jury is necessary. *Watson* vs. *Bondurant*, 1.

Any former member of a dissolved commercial firm may be brought into court by a firm creditor and condemned for a social debt, contracted while he was a member, on a citation addressed to the *firm*, but served personally on him; when the citation is accompanied by a certified copy of the petition, in which the creditor prays for a judgment against *each* former member of the firm *in solido*.

J. H. Montague et al. vs. *Weil & Bro.*, 50.

The right to an office will not be considered on any rule taken in this court.

Police Jury of the Parish of Plaquemines vs. *James Foulhouze et al.*, 64.

If one of the parties to an appeal dies, pending the appeal, a valid judgment may be rendered against his succession by making his administrator a party to the suit, and prosecuting it to a judgment contradictorily with the administrator.

Anderson vs. *Arnette et al.*, 72.

An act of sale which contains the stipulation of a real price, no matter how fraudulent the sale may be, can not be disregarded, and assailed collaterally, like a simulated sale.

Billgery vs. *Ferguson*, 84.

Heirs of age who are in possession of the property of a succession, and minor heirs in possession of it by virtue of its being under the control and administration of their natural tutor, may be sued by any creditor of the succession, in a court of ordinary jurisdiction.

Soye vs. *Price et al.*, 93.

No intervention can be filed in a suit for a partition, after judgment decreeing the partition has been rendered. That judgment is definitive, and hence the suit can not be considered as pending until the final decree homologating the partition.

Woolfolk vs. *Woolfolk*, 139.

Parties who intervene in a partition suit can not be considered as third opponents to the execution of the judgment in the suit, unless they either claim to be owners of the property on which the judgment is sought to be executed, or claim a preference on the proceeds of its sale. *Ib.*

A suit for the nullity of a judgment can not be brought by way of intervention, or third opposition. It must be brought in the ordinary form, by petition and citation. *Ib.*

No peremptory exception filed in this court will be noticed, unless filed

PRACTICE AND PLEADING—*Continued.*

while the trial of the case is still pending. It is too late to file such an exception after the case is submitted.

James J. O'Hara vs. *City of New Orleans, 152.*

When the plea of prescription is filed in a suit, not as an answer, but as a peremptory exception, it will not have the effect of setting aside a judgment of default previously rendered in the suit; and on the overruling of the exception, thus filed, the plaintiff is entitled to introduce his proof to confirm his default, and to compel the judge *a quo* to hear his proof and pass on his application to confirm.

State ex rel. E. Borland, Jr., vs. *the Judge of the Second Judicial District, 155.*

An agent, or depositary, in whose hands certain property attached in a suit has been placed for keeping and sale, by the parties claiming adverse rights in the same, can not be compelled by the attaching creditor, on a mere *rule*, to deliver said property, or proceeds of the same, to the sheriff. No action can be had against the depositary in such a case by the attaching creditor until his rights have been fixed by a decree rendered contradictorily with all other parties asserting an interest in the property.

Thomas J. Meshew vs. *S. F. Gould, 163.*

In a possessory action the plaintiff's title to the property in contest is put at issue, and therefore its validity may be judicially inquired into. *Louis Fix* vs. *Succession of Mrs. W. H. Dierker, 175.*

To maintain a suit for partition, the heir who brings the suit must make each one of his co-heirs a party to the proceeding. Every person interested, must be made parties to the suit.

Boutté et al. vs. *Executors of Boutté, 177.*

Redundancies in pleading will, on motion to that effect, be stricken out.

Charles F. Bevens vs. *Meyer Weill et al., 185.*

Before a judgment creditor, having a privilege on certain immovable property which has been really sold by his debtor to a third person, can seize and subject that property to his judgment, he must first bring a revocatory action and have the sale of the property annulled. *Ib.*

A mortgage creditor of a succession, whose debt has not been novated, having failed to take any action in a court of ordinary jurisdiction to foreclose his mortgage, can not ask for the revocation of an order of sale of the mortgaged property, granted by the probate court on the prayer of the administratrix, on the ground that the property no longer belonged to the succession, but belonged to a third person, who, in purchasing the property from the decedent, had assumed to pay his, (the creditor's) debt.

Succession of L. H. Tabarry, 187.

PRACTICE AND PLEADING—*Continued.*

One who has tacitly allowed a judgment to be rendered against him, can not assail it collaterally, on a rule taken by a third person to carry the judgment into effect. He must proceed by a direct action to annul.

State ex rel. Elder vs. *Judge of Third District Court et al.*, 229.

The execution of a judgment can be arrested in but two ways, by a suspensive appeal, and by injunction. *Ib.*

The appropriate process to arrest an order of sale, rendered on a rule to show cause why property should not be sold is the process of injunction, not appeal.

State ex rel. McCloskey et al. vs. *Judge of Second District Court*, 233.

Neither the legatee of an annuity in a succession, nor the residuary legatee, has a right to frustrate or retard the sale of property prayed for by particular legatees for the payment of their legacies. *Ib.*

A general plea of "prescription," without indicating what specific prescription the party invokes, and relies on, is too vague for this court to take cognizance of.

Widow Sarah Gaines vs. *Succession of Martinez Del Campo*, 245.

The validity of a garnishee's title to property in his possession, of which he claims the ownership, can not be passed on in a rule, taken to traverse the answers of the garnishee. Such an issue can only be passed on in a direct suit brought to test the sufficiency of the title.

Martin Ivens, Jr., vs. *E. M. Ivens & Co. C. S. Johnson, Garnishee*, 249.

The question whether an executrix has been legally appointed can not be raised collaterally, on an opposition to her account. It can only be considered in a direct action to revoke.

Succession of Baptiste Dougart. Opposition to the Account of Executrix, 268.

A general denial, in an opposition to the account of an executrix, puts at issue each and every item in the account, and puts on her the *onus* of proving each item. *Ib.*

The object of the rule *nisi* in a mandamus proceeding is not to ascertain whether the court erred in granting the rule, but whether the mandamus should be made peremptory. And hence it is to the latter inquiry alone that the respondent should address himself.

State ex rel. C. C. Durand et al. vs. *Parish Judge of St. Martin Parish*, 282.

A party having occasion to apply for mandamus in two suits, before the same judge, may state his causes of complaint, with respect to both, in a single petition. *Ib.*

PRACTICE AND PLEADING—*Continued.*

Where an application for a writ of injunction, filed in conjunction with an opposition to a seizure and sale, is referred to the merits, and no restraining order was issued until after a hearing on the merits, it is immaterial whether the affidavit for the injunction was legally sufficient, or not.

Jean Claverie vs. *L. A. Gerodias and Her Husband, 291.*

A defendant who pleads certain exceptions to the suit against him, is, so far as the exceptions are concerned, a plaintiff, and hence must prove the exceptions.

R. R. Barrow vs. *Jules Lapene, John B. Pitman, Intervenor, 310.*

Thus, when the purchaser of property at a tax-sale, who is sued by the former owner for the recovery of the property, excepts, that the plaintiff must re-imburse him what he has paid for the property, and which inured to the benefit of the plaintiff, before the latter can demand the recovery of the property, such a purchaser must in order to maintain his exception show the precise amount that he is entitled to be re-imbursed. *Ib.*

One who sues for the nullity of a judicial sale, can not ask for the proceeds of the sale. The two demands are inconsistent, and mutually exclusive. In such a case the suit to annul will be dismissed.

Michael Dowling, Curator, vs *Hypolite Gally, 328.*

The purchaser of property at a judicial sale, is a necessary party to a suit brought to annul the sale. *Ib.*

The only legal methods of arresting a sale under executory process, or the proceeds of such a sale, are by appeal, by injunction and bond, and, (in certain cases enumerated in articles 738-739 Code of Practice) by opposition and injunction *without* bond. *Ib.*

The facts that a written demand was made on defendant before suit was brought, that he answered by a general denial, and specially averred in his answer that too much interest was demanded, and it appears that he and his counsel were absent on the trial of the cause, are all corroborating circumstances, and in conjunction with the testimony of one witness, will prove a claim for more than five hundred dollars. *M. Goepper & Sons* vs. *Casper Lusse, 392.*

On the rule to dissolve an attachment the defendant in the suit may put at issue, and require to be passed on, all of the allegations of the plaintiff's affidavit, on which the writ of attachment itself legally rests. And when such allegations are thus put at issue, the plaintiff must prove them to be true. On such a rule however, no allegation, or fact, involving the merits of the case, will be considered.

Herrmann & Vignes vs. *Justin L. Amédée, 393.*

Joint obligors may be sued separately, and judgment recovered against

PRACTICE AND PLEADING--*Continued.*

each of them for his proportion of the debt, without making his co-obligors parties to the suit.

H. J. Mitchell, Tutrix, vs. *T. H. D'Armond*, 396.

Under the plea of general denial, in a suit brought to enforce the funding of certain State bonds, evidence is not admissible to prove an adverse title to the one declared on by the holder of the bonds.

Hamlin et al. vs. *the Board of Liquidators*, 443.

In suits between holders of bonds and the Board of Liquidation, (under the funding acts of 1874 and 1875) the only question that can be put at issue is the validity of the bonds, as obligations of the State. The issue of the *ownership* of the bonds can not be raised, save by a rival claimant, intervening and setting up an adverse title. *Ib.*

The mere fact that a certain bond of the State belongs to one of the issues declared by the act of 1875 to be questioned and doubtful, will not authorize the holder of that bond to intervene in a suit brought against the Board of Liquidators by the holder of bonds belonging to *another* of the questioned and doubtful issues. *Ib.*

When a certain fact put at issue by the pleadings is peculiarly within the knowledge of the defendant, such for instance as the consideration of a transfer made by him, the burden of proof is on him to show that fact. *Wm. M. Lovell* vs. *James A. Payne et al*, 511.

The refusal of the lower court to continue a case, on the ground that a material witness was absent, who had been properly summoned, and for whom an attachment was then out, will not lead this court to set aside the judgment, when it appears that the attachment for the absent witness issued six months before the trial of the case.

Carroll & Co. vs. *Hamilton*, 520.

Amendments of pleading will not be allowed during the trial of a case, when they will delay the trial, and change the issues.

Sevin & Gourdain vs. *Caillouet*, 528.

Whether the judge below has, or has not improperly refused to sign a bill of exception, is a question which can only be inquired into, when brought before this court in a *mandamus* proceeding.

State vs. *Gunter*, 536.

The charge of the lower court and the facts urged as grounds for a new trial can be brought before this court in no other way than by bills of exception. *Ib.*

A citation served on the husband, addressed to the husband and wife, is a good service on the wife. *McElvin* vs. *Taylor*, 552.

Whether a certain instrument is, or is not a public record, is a question of law for the court to determine. *State* vs. *Anderson*, 557.

The administrator of a succession can not maintain an action for the recovery of real estate, alleged to be the property of the succession,

PRACTICE AND PLEADING—*Continued.*

when the heirs of the succession are present, and all of them are not made parties to the suit. *Ledoux* vs. *Burton*, 576.

It is only in cases in which the execution of a judgment is enjoined, that, on the trial of the injunction, the sureties on the injunction bond are parties to the suit. It is therefore only in such cases that the sureties can be condemned in damages, in the judgment dissolving the injunction. In all other cases the sureties must be proceeded against by a separate action on the bond.

Scott & Williams vs. *the Sheriff et al*, 580.

Where there is no community of interest between several co-plaintiffs in a suit, although the rights and relief sought are of the same character, the actions of these several parties can only be cumulated by consent of the defendant. Such a suit, on an exception of misjoinder of parties by the defendant, will be dismissed.

C. D. Favrot et al vs. *Parish of East Baton Rouge*, 606.

The application for a rehearing made by an *amicus curiæ*, although filed within six days, will not suspend a judgment of this court, when not called to the attention of the court, and no order is asked, or made in relation to it, within that time.

Lesassier & Binder vs. *the Board of Liquidation*, 611.

A plea of prescription filed by a defendant impliedly admits the plaintiff's ownership of the note sued on.

B. W. Sewell vs. *Chas. McVay, Executor*, 673.

The tender of a license tax, and its deposit in court by a defendant who is threatened by the State with seizure, and against whom an injunction has issued to restrain him from carrying on his business, are not such voluntary acts as will estop him from pleading the unconstitutionality of the tax, and recovering the amount of the tax, if the same is adjudged to be illegal.

The State vs. *John P. Becker*, 682.

Any change in the judgment of the lower court, desired by the appellee, must be asked for by him in a regular answer to the appeal. It is not sufficient to demand it merely in his brief. *Ib.*

A mortgage creditor may proceed directly against the property subject to his mortgage, even though the property may have been sold for taxes, and the tax title be in the name of a third person, when it appears from the evidence that such title is a fraudulent simulation, and that the original mortgage debtor, who had colluded with the purchaser at the tax sale, is still the real owner of the property.

S. T. Austin, Jr., vs. *Citizens' Bank and Sheriff*, 689.

A judgment absolutely null, may be attacked collaterally, in any form of proceeding, by any one having the least interest to have the nullity pronounced. *Conery* vs. *Rotchford, Brown & Co.*, 692.

PRACTICE AND PLEADING—*Continued.*

The executor may prosecute to its final termination, an action instituted by the testator to annul a donation *inter vivos* made by him.

E. S. Eskridge and Husband vs. *E. D. Farrar, Agent; and M. E. Ogden et al.* vs. *the Heirs et al. of John Perkins*, 718.

A reconventional demand for damages can not be separately tried, and the judgment rendered on such a demand can not be separately appealed from. It must be tried and appealed with the main suit.

Crescent City L. S. L. & Slaughter-House Co. vs. *Larrieux*, 740.

The court can not, of its own motion, change the form of a proceeding from an executory, to an ordinary one. Such a change can not be made without the assent of the seizing creditor.

Calhoun vs. *Mechanics' and Traders' Bank*, 772.

An action to annul a judgment can only be brought by one who has a real and actual interest impaired by such judgment.

Neel vs. *Hibard*, 808.

When the motion for a new trial, on the ground of newly discovered evidence, does not disclose the evidence, or the source from which it is derived, the motion is defective, and should be overruled.

The State vs. *S. W. Curtis*, 814.

Under our practice nothing prevents the cumulation of demands for the double purpose of proving the existence of a partnership, when the defendant has denied it, and for its liquidation, when proved.

Mills vs. *Fellows*, 824.

To entitle a party to the continuance of a case, on the ground of absent witnesses, it is necessary not merely to allege but to prove, that he had been diligent, that he was surprised, that he could not prove the facts by other available witnesses, and that they were not absent by his consent or procurement. *Ib.*

When the court orders the defendant to produce in court certain books, which plaintiff swears will prove certain facts, and defendant files, in response to the order, an evasive answer, and fails to produce the books, on the day fixed in the order [no matter whether the case came up for trial that day or not] the court will be authorized to order that the *specific* facts (but only the specific facts) sworn to by the plaintiff, be taken as confessed by the defendant. *Ib.*

Judgments which are not absolutely null and void, can not be attacked in any collateral manner. *Compton* vs. *Sandford*, 833.

A general allegation, in an exception, that the charge of the lower judge "*is not law*," is too vague. *State* vs. *Williams*, 842.

The citation of appeal, in a case where the State is a party, must be served on the attorney for the State who has obtained the judgment appealed from. If absent, the service must be made at his domicile as in ordinary cases. *The State* vs. *George Tennant et al*, 852.

PRACTICE AND PLEADING—*Continued.*

In a suit to annul a tax sale of real estate made by a State tax collector, the State is not a necessary party.
Workingmen's Bank vs. *Blaise Lannes et al.*, 871.

Any absolute nullities in a tax sale of property may be set up, and availed of by the creditors of the owner. *Ib.*

One of the defendants in a suit in which a formal judgment has been rendered can not disturb that judgment either by an action of nullity, or by appeal, without making all parties to the proceeding who were parties to the original suit.
John A. Morris vs. *Neuville Bienvenu et al.*, 878.

An action of nullity can not be maintained pending a suspensive appeal involving the same issues. *Ib.*

One who is a citizen of another State, although he have a dwelling here, and reside in it, for some months during each year, is nevertheless an "absentee" and hence, if he have no known representative here, may be legally represented in a suit brought against him by a curator *ad hoc*. *Ib.*

When an absentee is brought into court not by attachment, but by service of citation on a curator *ad hoc*, it is not necessary to post the citation on the door of the court-room. *Ib.*

In a rule to compel the purchaser of property at a succession sale to comply with his bid, he can not put at issue the rightfulness of the recusation of the judge of the court from which the order for the sale issued. *Succession of François Lecroix*, 924.

When one is sued as heir, or widow in community, or in any other representative capacity, the plea of general denial admits that capacity. *Edwards* vs. *Ricks*, 926.

A non-resident debtor sued in this State and personally cited, may have a personal judgment rendered against him for the whole debt due by him. *Leopold de Poret* vs. *A. L. Gusman et al.*, 930.

The allegations in a petition that a certain transfer of property is a simulation, and that it is a donation in disguise, are inconsistent.
J. N. Brown, Administrator, vs. *E. A. R. Brown*, 966.

The objection that a part of the immovables of a succession sold for less than their appraised value, and hence that its sale was null, is not an objection which the notary, before whom a judicial partition of the succession property is pending, could be required to refer to the court, before completing the partition. Such an objection can only be properly urged by way of opposition to the homologation of the partition.
Julia A. Ventress, Executrix, vs. *Isaac D. Brown et al.*, 1012.

In the rule *nisi* granted by this court on an application for a writ of prohibition, the answer of the defendant should be sworn to.
State ex rel. Kramer vs. *Judge Sixth District Court*, 1014.

PRACTICE AND PLEADING—*Continued.*

The police jury of a parish are not a necessary party to a suit brought by the State tax collector to enforce the payment of parish taxes.
Gonzales vs. *Lindsay*, *1085.*

An action to set aside a sale of real estate made by its deceased owner, on the ground of simulation, may be brought by the executor and forced heirs collectively, or by the heirs separately.
A. A. Guilbeau, Tutor, et al. vs. *Tréville Thibodeau et al.*, *1099.*

The amendment to an answer which substantially changes the defense will not be permitted. *Ib.*

A defendant who excepts to the capacity of the plaintiff to stand in judgment does not waive the benefit of the exception by failing to require the court to rule on it before passing to the merits.
Elisée Thibodeaux vs. *Adolphe Comeau and Wife*, *1119.*

The dative testamentary executor alone can not maintain an action to revoke a donation *inter vivos* made by the deceased, on the ground that the donees have not fulfilled the conditions of the donation. The heirs of the deceased are necessary parties to such an action. *Ib.*

In a rule taken on a judge to show cause why he should not be recused in a certain suit, personal citation of the defendant, even when served on him in a parish other than the parish of his domicile, is sufficient.
State ex rel. W. F. Schwing, District Attorney pro tem., vs. *Theodore Fontelieu et al.*, *1122.*

Parties may be sued before whatever tribunal the Legislature shall designate. *Ib.*

To a rule taken under act 129 of 1877 on the district judge, and the parish judge of the parish in which a certain suit has been brought, to show cause why both of them should not be recused in the suit, the parish judge is a necessary party to the rule, and the trial of the rule should be continued until he has been cited. *Ib.*

A reconventional demand must set forth the claim of defendant with the same precision as would be required in a petition for the same cause of action, and a mere reference in his answer, to a former suit brought by the defendant, does not make the allegations of the petition in that suit a part of his answer.
W. C. Teal et al. vs. *Oscar S. Lyons et al.*, *1140.*

When the offsetting claim set up by the defendant is wholly independent of, and distinct from the claim of the plaintiffs, the mere fact that *one* of the plaintiffs is in another parish from the one in which the suit is brought, will not authorize the defendant to plead his claim in reconvention. *Ib.*

The filing of an amended opposition to a tableau of distribution will

PRACTICE AND PLEADING—*Continued.*

not be permitted, when it prays the court to do the very reverse of what the same opposer, in his original opposition, has judicially admitted ought to be done.

Succession of Jacob Anselm. Opposition of a Creditor, 1145.

On the trial of the exception of no cause of action, the Court can consider only the allegations of the petition, and the exhibits referred to, and made part thereof. *Edward Nalle* vs. *T. W. Baird, 1148.*

The defendant in injunction is authorized to compel the plaintiff to prove the truth of the facts alleged by him, in a summary manner. It is not needful for the suit to be at issue, or fixed for trial, or called, before the rule on the plaintiff to prove his alleged facts can be tried.

W. C. Williamson vs. *T. P. Richardson, Sheriff, et al., 1163.*

When a debtor enjoins the execution of a judgment for any of the causes mentioned in article 739 of the Code of Practice, he is not permitted, on the summary trial of the rule on him, to prove the facts alleged by him, to introduce evidence of any thing but the particular cause in article 739 on which he has based his injunction. *Ib.*

A foreign corporation, represented by a general agent, and local Board of Directors residing in the city of New Orleans, can not be brought into court by a citation served on a local agent domiciled in one of the country towns of Louisiana, who is only authorized to receive applications for insurance, and give binding receipts for the same, and who has not exercised, or represented that he possessed, any other authority.

W. P. Weight et al. vs. *Liverpool, London & Globe Insurance Company, 1186.*

It is not an inconsistency in pleading, in a direct action to annul, to allege that a sale is simulated, and if not simulated that it is fraudulent. *B. M. Johnson* vs. *Mrs. Julia Mayer et al., 1203.*

Where a defendant alleges as a ground of defense, error, overcharges, and payment, and sets up a claim in reconvention on the basis of those allegations, he must set them forth with such particularity as to put the plaintiff on his guard, before he will be allowed to introduce evidence in proof of them.

Bayly & Pond vs. *Stacy & Poland, 1210.*

Replications, under our law, are not admissible, and all the allegations of an answer are open to any objections of law or fact. *Ib.*

Pleas in reconvention require no service, and need not be put at issue by answer or default. *Ib.*

The alleged owner of property which has been sold at a tax-sale can not maintain an action for its recovery, until he has tendered to the

PRACTICE AND PLEADING—*Continued.*

purchaser at the tax-sale the price paid by the latter, and which was applied to the payment of the taxes and costs due by the owner.

Lola Blanton vs. *John T. Ludeling et al.*, *1232.*

One who urges an exception of misnomer must allege, and prove the real christian name, and that done, the party against whom the exception is filed should be permitted to amend at once.

R. W. Daugherty et al. vs. *Executrix of S. W. Vance*, *1246.*

Where a third person in whose possession property has been attached, intervenes, and claims the ownership of the property, his intervention need be served only on the plaintiff in attachment. It is not necessary for him to cite the defendant in attachment who does not dispute his title. *Henry Gerson, Jr.*, vs. *Larkin Jamar*, *1294.*

Except in a case of trespass on real estate, a claim for damages can not be made in an intervention against one who does not reside in the parish where the principal action is pending. *Ib.*

A claim for damages against the sheriff can not be coupled with an interventional demand setting up the intervenor's title to personal property attached in his hands. *Ib.*

An hypothecary action against a third possessor of mortgaged property who was not a party to the previous suit and judgment of the plaintiff against the former owner of the property is a new suit, and not the mere continuation of the previous suit.

Garrett vs. *Bonner*, *1305.*

A state of facts brought to the attention of the court which would justify and require a new trial after judgment will justify the re-opening and re-assignment of the case before judgment.

James Buckley vs. *Wm. H. Seymour*, *1341.*

A demand for the revendication of a certain property, and an alternative demand for its value, in case the defendants have incumbered it with obligations beyond its value, may be cumulated in the same suit. *Maduel, Ex.*, vs. *Tuyes et al.*, *1404.*

PRESCRIPTION.

The claims of sheriffs, and clerks of courts, for the annual sums of money due them for their services in the criminal matters arising in their courts, are not prescribed in two years from their maturity unless proved up, and audited within that time. This prescription only applies to claims which require evidence to establish, not to those whose amounts are fixed by law.

The State ex rel. Monroe M. Samuel vs. *Allen Jumel*, *339.*

A verbal acknowledgment of, and promise to pay a promissory note, made by one of its solidary makers before its prescription, will interrupt prescription as to all of the makers.

Boullt vs. *Sarpy*, *494.*

PRESCRIPTION—*Continued.*

Open accounts of merchants and factors for supplies furnished, and money advanced, are prescribed in three years.
Sevin & Gourdain vs. *Caillouet*, 528.

Not only good faith, and possession of real estate for ten years is required, but also a legal and transferable *title of ownership* is required in order to acquire said property by prescription.
Pendegast vs. *Schawlz*, 590.

The State not being suable, except by her consent, prescription, as to debts due by her, is suspended.
Lesassier & Binder vs. *the Board of Liquidation*, 611.

Prescription does not run against a debt due by the husband to the wife, during the marriage. *Sewell* vs. *McVay*, 673.

Prescription does not begin to run against a debt due by the father and natural tutor to his children, until his death, or their majority. *Ib.*

Prescription does not run against a debt due by a father's succession to his minor children, during their minority. *Ib.*

The suit of a creditor to annul a conveyance of property by his debtor, for any ground of fraud (except the one of giving an unjust preference by an insolvent debtor) is only prescribed in one year from the time the creditor has obtained judgment against the debtor.
Lehman, Abraham & Co. vs. *Mrs. Yette Levy and Husband*, 745.

One who holds possession of real estate as an agent, can not acquire the property of such estate by prescription.
Aurore Neel vs. *Pélagie Hibard*, 808.

The acknowledgment of a succession debt by the administrator of the succession suspends the prescription of the debt as long as the property of the succession remains in the hands of the administrator, under administration.
Henry Renshaw vs. *Geo. W. Stafford, Executor, et al.*, 853.

One who holds as owner peaceable, public, and uninterrupted possesison for ten years of an immovable which he has acquired from one whom he honestly believed to be the real owner, under a title translative of the property, acquires by prescription the legal ownership of the immovable.
J. Mat. Wells, Jr., Executor, vs. *F. M. and Ida Wells*, 935.

Whoever alleges bad faith in the possessor of property who claims a title to it by prescription, must prove the bad faith. *Ib.*

A judgment rendered by a court of competent jurisdiction, and where the proper parties have been duly cited, can not be attacked in any collateral way, even by third persons not parties to it.
Succession of P. G. Quin, 947.

PRESCRIPTION—*Continued.*

The written acknowledgment, or judicial admission of a judgment debt of a succession, made by the executor before the debt is prescribed, will interrupt prescription. *Succession of Patrick, 1071.*

The action against the vendee to annul a simulated sale is not prescriptible. *Guilbeau* vs. *Thibodeau, 1099.*

The institution of executory proceedings on a mortgage note will interrupt prescription of the note, unless the proceedings are dismissed on motion of the plaintiff. *Tertrou* vs. *Durand, 1108.*

The action to annul a *dation en paiement* which was simulated, and thus void *ab initio*, is not subject to the prescription applicable to the dispositions of property that are real, but fraudulent as to creditors. *Queyrouse & Bois* vs. *Thibodeaux, 1114.*

The obligations of a depositary are prescribed in ten years from the time he is in default for not restoring the deposit.

Berard vs. *Boagni, 1125.*

The possession by the creditor of property of his debtor, with the latter's consent, for the purpose of paying himself out of its hire, is an acknowledgment of the debt which interrupts prescription.

Scovel vs. *Gill, 1207.*

Debts due the city of New Orleans on account of unpaid taxes are prescribed in ten years from the time the taxes are exigible.

Succession of Zacharie, 1260.

Letters of a debtor to his creditor declaring his inability to pay, and asking for indulgence, are such an acknowledgment of liability as interrupts prescription.

Interruption of prescription by the acknowledgment of the principal debtor interrupts it as to his surety.

Bloom & Co. vs. *Kern, 1263.*

The debt due for services as an agent or mandatary is only prescribed in ten years.

When one obligates himself in writing to pay a certain sum on the happening of a certain event, the obligation is only prescribed in ten years. *Chas. D. Gilmore* vs. *B. F. Logan, et al., 1276.*

Neither a suspensive nor devolutive appeal will prevent prescription from running against the judgment appealed from.

Marbury vs. *Pace, 1330.*

PRESCRIPTION IN CRIMINAL MATTERS.

See Criminal Law.

PRESUMPTIONS OF LAW.

See Evidence.

PRINCIPAL AND AGENT.

Where a party, acting through an agent, loans money on the security of the borrower's mortgage, and the agent, who keeps the note in his

PRINCIPAL AND AGENT—*Continued.*

possession, pays over from time to time to his principal the accruing interest and parts of the principal of the note received from the maker, finally pays over to the principal the balance due on the note, without stating that he is paying his own money, and without obtaining the consent of his principal to buy, or even intimating that he desired to buy the note, he will not acquire any title to the note; and the note itself, and the accompanying mortgage, will be deemed extinguished.

Albert G. Brice vs. *John A. Watkins et al., 21.*

A power of attorney authorizing an agent to sell real estate need not be by authentic act. It is only necessary that it be in writing, and properly attest *Amelia Smith* vs. *T. J. Kinney, 332.*

One who constitutes another his agent with full power to manage his mercantile house, and to do all acts appertaining to his business, makes himself liable for the value of all goods purchased by the agent in the line of that business.

Schmidt & Zeigler vs. *Sandal et al., 353.*

Where an agent, clothed with power to accept bills, has accepted a bill in the name of his principal, the latter can not escape liability as acceptor, on the ground that he had no interest in the transaction in which the bill was given, and that he had received no consideration, unless he proves that his agent, to the knowledge of the holder of the bill, has abused his power.

Broadway Savings Bank of St. Louis vs. *Edward Vorster et al., 587.*

A power of attorney authorizing an agent to sue for a specific debt, and to do all in the premises that the principal could do, carries with it the power to make the suit effective by attachment.

De Poret vs. *Gusman, 930.*

No act done, or declaration made by an agent in his individual capacity, and unauthorized by his principal, can estop him from doing any thing he is authorized to do as agent. *Ib.*

An attorney in fact can not bind his principal as surety, unless he is specifically authorized to do it.

State ex rel. Merchant vs. *Daspit, 1112.*

PRIVILEGE.

Where cotton is nominally sold for cash, but the price is not paid on delivery of the cotton, and the vendor receives on the following day a part of the price, and accepts security for the balance, he thereby waives any privilege he may have as vendor, and is estopped from sequestering the cotton in the hands of a subsequent *bona fide* vendee, or pledgee of the cotton.

M. Musson & Co. vs. *A. Foster Elliott, 147.*

PRIVILEGE—*Continued.*

The contractor who furnishes the material and builds a jail for a parish, under a contract with the police jury of the parish, has the mechanics' lien and privilege on the jail, to secure the payment of what is due him under the contract. *McKnight* vs. *Parish of Grant, 361.*

The mechanic who builds a church for a certain congregation, is entitled to the mechanic's lien on the church, and the ground, belonging to the congregation, on which the church is situated, to secure the payment of what is due him for his work.

Jones vs. *Trustees of the Congregation of Mount Zion, 711.*

A contractor who furnishes materials for a building and fails to record his contract, acquires no lien on the building, and the lot on which it is erected, and hence, no creditor of his can acquire such a lien from him, either by subrogation, or in any other way.

Louis Schwartz vs. *George Cronan et al. George A. Fosdick & Co., Intervenors, 993.*

One who sells to a contractor the raw materials which are actually used by the contractor, in a manufactured form, in constructing certain portions of a building, and who has served on the owner of the building an attested account of the amount due him by the contractor, is only entitled to recover from the owner such an amount of the sum due by the owner to the contractor, as has been adjusted, ascertained, and fixed, in some one of the modes pointed out by sections *two* and *three* of article 2772 of the Civil Code. Such a furnisher of raw materials can acquire no lien, or privilege, except as subrogee to such privilege as the contractor may have acquired and preserved. *Ib.*

The privilege acquired by one creditor on certain property gives him, or his transferee, no preference over another creditor who had previously acquired a mortgage on the property, unless the act, or other evidence of the privilege debt, was recorded on the day the debt was contracted.

Edward J. Gay & Co. vs. *Gilbert A. Daigre et al., 1007.*

Recording an account current for advances made by a factor to a planter, running through several months, the day after the date of the closing of the account, is not recording the evidence of the debt on the day on which the contract for making the advances was entered into. *Ib.*

The pledge which the act No. 66, passed by the Legislature in 1874, gives to factors, and others, on certain property of planters, when they have made and recorded certain written contracts, will not operate to the prejudice of creditors holding pre-existing mortgages on the property, unless the contracts were recorded on the day they were entered into. *Ib.*

PRIVILEGE—*Continued.*

A building contractor who fails to record his contract acquires no privilege on the building so far as third persons are concerned.

Van Loan vs. *Heffner*, *1213.*

Where a vendor of real estate sets forth in the act of sale that he has received a portion of the price in cash, and notes of the vendee payable at a future day and secured by mortgage on the real estate for the balance of the price, but actually received in place of the cash, and without being induced to do it by error or fraud, drafts of the vendee or some third person, such drafts will not entitle the vendor, or his transferee, to a mortgage, or vendor's privilege on the property sold. *Durham* vs. *Heirs of Daugherty*, *1255.*

Contracts made with factors to give them a privilege or pledge on crops, must stipulate the sum to be secured by such privilege or pledge, and no further sum than that thus stipulated and fixed can be covered by such contracts to the prejudice of other creditors.

Gay & Co. vs. *Pike*, *1332.*

The lessor of land fronting on a river and leased for dockyard purposes is entitled to the lessor's privilege on the dock itself, when the dock is attached in front of the land by a permanent staging, and for a permanent purpose. *Cochran* vs. *Ocean Dry-Dock Co.*, *1365.*

Money and goods advanced by a factor to a planter and used in paying the laborers who make the crop constitute privilege debts on the crop. *E. B. Benton* vs. *T. C. Mahan et al.*, *1401.*

Disbursements made through the sheriffs by order of court, to gather, manufacture, and ship the crops on a plantation in the keeping of the sheriff, are debts incurred for the preservation of the crops, and therefore privileged. *Ib.*

PROMISSORY NOTES.

See Bills and Notes.

PUBLIC ADMINISTRATOR.

A public administrator, as such, is not entitled to administer as dative testamentary executor a succession of which the testamentary executor has died, and one or more of the heirs are present in the State.

Succession of Bougère, *422.*

Where a public administrator, who is one of the heirs of a succession, is appointed dative testamentary executor of the same, it will be assumed, if the contrary is not shown, that he was appointed, not as public administrator, but as heir, under the general law, and his commission will be fixed at two and a half per cent. *Ib.*

One who is appointed to the office of Public Administrator at any time during an unexpired term of that office, is entitled to hold it, in virtue of that appointment, only to the end of that unexpired term.

State ex rel. Wilson vs. *Parker*, 1182.

RAPE.

See Criminal Law.

RECORDERS' COURTS.

The exercise of judicial power by the Recorders of New Orleans, when not extended further than the cognizance of cases arising under the regulations for the police of the city, is constitutional. Such cases need not be tried by jury.

State ex rel. Geale vs. *Recorder of First Recorder's Court*, 450.

RECONVENTION.

See Practice and Pleading.

RECUSATION.

See Judges.

REHEARING.

See Practice and Pleading.

REMANDING CASES.

See Judgments.

REMOVAL OF CASES FROM STATE TO FEDERAL COURTS.

Where a person has a domicile in a State, and the evidence shows that he resides there with the intention of remaining, he is, in contemplation of the laws providing for the removal of causes from State to Federal courts, a citizen of that State.

Frank Watson vs. *Mrs. E. F. Bondurant*, 1.

Citizenship in a State is not lost by a temporary absence; but a prolonged residence in another State, accompanied by other acts, or by declarations showing an intention to acquire a domicile in the latter State, will forfeit citizenship in the former State, and preclude its being set up in a suit. *Ib.*

To qualify in this State as natural tutrix, or as testamentary executrix, *without giving bond*, is strong proof of an intention to permanently reside here, and is utterly incompatible with the claim of citizenship in another State. *Ib.*

A merely auxiliary proceeding, by which a third person comes in by way of injunction to protect his property from being seized and sold under a judgment to which he was not a party, is not removable, under the act of Congress of March 3, 1875, from the State to the Federal court. *Ib.*

When a judgment debtor brings suit in a State court to annul a judgment of that court against him, and in favor of a non-resident creditor, the latter is not, under the act of Congress passed in 1789, entitled to an order to remove the case to a Circuit Court of the United States. *D. L. Ranlett* vs. *Collier White Lead Company*, 56.

An order of a district court of the State granting the removal of a case to the Circuit Court of the United States may be appealed from.

Warrick Tunstall vs. *the Parish of Madison*, 471.

REMOVAL OF CASES TO FEDERAL COURTS—*Continued.*

When an application for the removal of a suit from a State to a Federal court is made, the State court has jurisdiction to determine the question whether the applicant has brought himself within the provisions of any act of Congress authorizing the removal. But in considering this question, the court should only allow such allegations of fact to be put at issue, as are material to its determination. *Ib.*

In an application for the removal of a suit from a State to a Federal court under the act of Congress of 1867, known as the "Local Prejudice Act," the applicant need not swear to his citizenship. The necessary allegation as to his citizenship, need only be set forth in his pleadings. *Ib.*

The affidavit required by the "Local Prejudice Act," should be made by the applicant himself. The affidavit of his *attorney*, that he (the attorney) has reason to believe and does believe, etc., is not sufficient. *Ib.*

For the purposes of Federal jurisdiction a corporation, whether political, municipal, or commercial, is regarded as a citizen of the State in which it was created, without regard to the citizenship of its members. Thus, a parish of this State is a citizen of Louisiana. *Ib.*

The "good and sufficient surety" required of the party who applies for the removal of a case to the Federal court need only be *offered* in the State court by the applicant at the time of filing his petition for removal. The written obligation of such surety need only be *filed*, after the surety has been accepted by the court. *Ib.*

The affidavit required of an applicant for the removal of a case under the "Local Prejudice Act," may be taken before any commissioner for this State residing in another State. Such a commissioner has authority to administer the oath. *Ib.*

Any suit between a citizen of this and another State, whether *in rem* or *in personam*, is under the act of Congress of 1875 removable from the State to the Federal court, when the matter in dispute exceeds $500, and when the application to remove is made at, or before the term of the State court at which the suit could be first tried, and before the trial thereof. *Franklin Garrett* vs. *Wm. Bonner*, *1305.*

Appearing and filing a plea of prescription in the State court, does not, under the act of Congress of 1875 prevent the defendant from demanding a removal of the suit to the Federal court. *Ib.*

When a defendant has filed the proper application and bond for the removal of the suit to the Federal court, in a case where he had the legal right to the removal, the jurisdiction of the Federal court will not be affected by the subsequent death of the defendant, and the execution of the appeal bond by his executor. *Ib.*

RES ADJUDICATA.

In a suit for damages on the ground of a wrongful sequestration of land, the judgment rendered in a former suit between the same parties, involving the ownership of the land, can not be pleaded as *res adjudicata*. The objects aimed at, and the causes of action in the two suits are entirely different.

Joshua C. Thoms vs. *B. W. Sewell et al.*, *359*.

Where a question of estoppel, as between certain parties to a suit, has been expressly, or by necessary implication raised, and definitively passed on, it can not again be put at issue in any subsequent suit between them. *Chatenond* vs. *Hebert*, *404*.

A final judgment against an intervenor in a sequestration suit, who claims the ownership of the property sequestered, has the force of *res adjudicata* as to those questions only that were passed on by the judgment; and hence those questions can not be subsequently raised by the intervenor when pursued as a surety on the bond given to release the property from the sequestration. A judgment has not the force of *res adjudicata* as to those who were not parties to it.

D. R. Carroll & Co. vs. *Mrs. Lizzie Hamilton et al., Post & Co., Intervenors*, *520*.

When the issues in a second suit are the same as those in a previous suit between the same parties, the mere fact that additional parties appear in the second suit will not prevent the judgment in the former suit from having the effect of *res adjudicata*, as between the parties who appeared in both suits, in the same capacities.

Ledoux vs. *Burton*, *576*.

A judgment can not have the force of *res adjudicata* as to one not a party to it. *Mrs. S. C. F. Logan* vs. *Harriet Herbert*, *727*.

So far as relates to creditors holding antecedent mortgages on property, and their recourse on the property is concerned, judgments obtained by others against their debtor, estopping him from setting up ownership to the property, are not *res adjudicata* as to them. *Ib*.

The issue of title to certain property, passed on by a final judgment, can not be raised again in a subsequent suit between the same parties. *Compton* vs. *Sandford*, *833*.

In order to maintain the plea of *res adjudicata* there must be an identity of parties, of capacity, of object, and of cause of action.

State ex rel. Collens vs. *Jumel, Auditor*, *861*.

A judgment against a party in a suit brought by her, as owner, for the recovery of certain land, may be pleaded as *res adjudicata* in a subsequent petitory action for the same land, brought by her heirs.

Sharkey vs. *Bankston*, *891*.

REVENDICATION.

See Nullity of Sales.

REVIVAL OF JUDGMENTS.

A void judgment can not be revived. *Laurent* vs. *Beelman*, 363.

A judgment reviving a judgment does not render valid that which is invalid, and does not cure radical nullities in the judgment revived.

Marie Perkins Evans and Husband vs. *Payne & Harrison*, 498.

In a suit to revive a judgment the defendant may allege and prove any fact showing the absolute nullity of the judgment. A judgment absolutely null and void, can not be revived. It is essential to the revival of a judgment that there should be a valid and subsisting one, which is a fact for the plaintiff to establish.

Conery vs. *Rotchford, Brown & Co.*, 692.

In a suit to revive a judgment against a succession, the acceptance of service, and waiver of citation by the administrator will be deemed a good service, and will justify the judgment of revival.

Logan vs. *Herbert*, 727.

Service of citation, and a certified copy of the petition in a suit, before the proper court to revive a judgment, made on the administrator of the judgment debtor within ten years of the date of the judgment, will interrupt prescription, even though the number of days within which the defendant was called on to answer was not specificially set forth in the citation.

Marcellite Martinez et al. vs. *Succession of Adolphe Vives*, 818.

The law of this State authorizing the revival of judgments was not intended to provide any different mode of *interrupting* prescription of judgments from those applicable to other forms of debt, but was only intended to prevent the prescription of judgment debts, and continue them in force for ten years from the date of the judgment of revival. The prescription of a debt evidenced by a judgment, can be interrupted in the same modes as the prescription of debts evidenced in any other way, except, that the acknowledgment of the judgment debt by the debtor must be *in writing*.

Succession of J. C. Patrick. Opposition of Carroll, Executrix, 1071.

In a suit to revive a judgment the sole issues to be tried are whether it had ever been rendered, and whether it had become extinct.

Wm. Marbury et al. vs. *Jas. F. Pace*, 1330.

A suit to revive a judgment is properly brought in the name of the original plaintiffs, even though the judgment may have become the property of third persons. *Ib.*

RULES.

See Practice and Pleading.

SALE.

A valid sale of property may be made with a right of redemption reserved by the vendor. *Bevens* vs. *Weill*, 185.

If the vendee in a contract of sale refuses to receive the article sold, the vendor may sell it at private sale; and on proving that he thus sold it at its full market price, he may recover from the vendee the difference between that price, and the price stipulated in the contract of sale. *Succession of Dougart*, 264.

One who buys property with full knowledge that the title to the same is in dispute, is not an innocent purchaser, and hence he acquires no greater rights than his vendors had.

Joseph V. Ledoux, Administrator, vs. *John C. Burton. Mrs. A. Ledoux, Intervenor*, 576.

An unrecorded deed transfers the property to the purchaser as against all the world, *except* creditors of the vendor, and *bona fide* purchasers from him without notice. *Logan* vs. *Herbert*, 727.

Except in a case when there is an express agreement in derogation of the general rule, the sale of goods, produce, or merchandise by weight, tale, or measure, is not perfect, and the goods at the risk of the buyer, until they have been weighed, counted, or measured. *William S. Peterkin* vs. *George Martin*, 894.

The purchaser of goods who has paid their price knowing them to be damaged when he paid for them, is not thereby estopped from suing for a diminuition of price, and damages, when it appears that there was an understanding between him and the seller, at the moment of payment, that his rights of reclamation were reserved. *Ib.*

A vendor who is ignorant of the vices of the things sold, is liable only for the difference, at the time and place of sale, between the actual value of the thing sold, and what it would have been worth if sound; and the expenses connected with the sale. *Ib.*

Before a vendee can recover for diminuition of the price, and for damages, on account of the damaged condition of the merchandise bought by him, he must show with reasonable certainty, that the merchandise was in an unsound condition at the time he became its owner. *William J. Peterkin* vs. *J. H. Oglesby & Co. et al.*, 907.

When an actual consideration, no matter how inadequate, has been paid by the purchaser in an alleged sale, the transaction is not a simulated one. *Brown, Administrator*, vs. *Brown*, 966.

The delivery of immovables, where they are disposed of by public act, is always considered as accompanying the act, whether that act be a sale, or a *dation en paiement*. *Ib.*

The record of a written agreement to sell certain property does not amount to a sale of the property. *Foreman* vs. *Saxon*, 1117.

SALE--*Continued.*

An alleged sale of his property by a debtor can have no effect as against a creditor who has attached the property, when the purchaser of the property fails to show that the act of sale was filed or recorded before attachment was levied.

J. C. Williams vs. *Wm. Heffner, Sheriff, et al., 1193.*

Where a debtor has specially mortgaged his whole plantation, as a unit, he can not demand that it shall be sold in parts. The creditor may compel the sheriff to sell it as a whole, and in block.

Morris vs. *Womble, Sheriff, 1312.*

SALES—PUBLIC.

See Sale.

SEIZURE AND SALE.

A writ of seizure and sale can not legally issue, until three days after notice of the decree of court, granting the writ, has been served on the debtor. *Joseph Billgery* vs. *Thomas Ferguson, 84.*

The notice of judgment in executory proceedings, which must be served on the debtor three days previous to the actual seizure of the mortgaged property by the sheriff, *must* be signed, and issued by the *clerk* of the court, and not by the sheriff. *Ib.*

If such notice has been issued by the sheriff, and objection to it is formally made before any sale of the seized property has taken place, the objection will be sustained, and no rights or liens will accrue to the seizing creditor, in virtue of the seizure. *Ib.*

Where the defendant in an executory proceeding enjoins the seizure and sale, on the ground that the mortgage debt is prescribed, he is dispensed from the necessity of giving a bond.

State ex rel. W. C. Williamson vs. *the Judge of the Fourteenth Judicial District, 314.*

The evidence is sufficient to authorize an order of seizure and sale, when the act of mortgage, note, and protest, are authentic in form.

Renshaw vs. *Richards, 398.*

When a creditor, who proceeds by executory process, states in the charging part of his petition that he has received a certain sum, in part payment of his debt, but in the prayer of his petition sets forth that he has received a less sum, the statement in the charging part of the petition will govern the prayer, and the order of seizure and sale, and entitle the debt to credit for the larger sum. *Ib.*

The executory proceeding may be arrested by injunction, and if, on being required, the defendant prove any of the facts set forth in article 742 of the Code of Practice, the order of seizure and sale will be revoked, and the plaintiff condemned to pay costs.

Calhoun vs. *Mechanics' and Traders' Bank, 772.*

SEIZURE AND SALE—*Continued.*

No copy of the petition for the order of seizure and sale need be served on the debtor, but only the notice of the order.

Williamson vs. *Richardson*, *1163.*

The judge may grant an order of seizure and sale on a note which is prescribed on its face. *Ib.*

It is not necessary that any United States internal revenue stamps should be affixed to a note, or a mortgage, in order to make it competent evidence in our State courts.

Pargoud vs. *Richardson*, *1286.*

In order to obtain executory process against property mortgaged to it by a deceased stockholder, it is necessary for the Citizens' Bank, like other mortgage creditors, to serve a notice of the order of seizure and sale on the legal representative of the deceased stockholder's succession, or on his heirs, if they are of age, and have accepted and are in possession of the succession.

Gillaspie vs. *Citizens' Bank of Louisiana*, *1315.*

SEPARATION OF PROPERTY.

A judgment of separation of property between husband and wife which is absolutely void, may be assailed directly, or collaterally, by any one who has an interest to do so.

Mrs. C. S. Willis vs. *E. M. Ward, Tutor*, *1282.*

A judgment of separation of property in favor of the wife, based exclusively on the incomplete testimony of her husband, is, as to third persons, an absolute nullity. *Ib.*

SEQUESTRATION.

Under the law of Louisiana mortgaged property may be sequestered.

Gest & Atkinson vs. *N. O., St. Louis, and Chicago R. R. Co.*, *28.*

A vendor of a movable who sues the executrix of the vendee, for the dissolution of the sale, and the recovery of the movable, and swears that he fears the defendant will part with, or dispose of the movable, during the pendency of the suit, is entitled to have the property sequestered. In such case he need not allege that he has a privilege on the property.

Daugherty vs. *Executrix of Vance*, *1246.*

SHERIFF.

A sheriff, who without warrant of law, or order of court, ejects the rightful possessor from property, and substitutes a wrongful possessor, is liable jointly with the wrongful possessor for whatever damages the ejectment caused.

Burton and Wife vs. *Brugier and Sheriff*, *478.*

The prescription, (of two years) of suits against a sheriff and his sureties for money collected by the sheriff and not accounted for, does not begin to run until the first demand for the money has been

SHERIFF—*Continued.*

made on him by the plaintiff, and the sheriff thus put in default for non-payment. *Soule* vs. *Norwood*, 486.

The sheriff of a parish can not be compelled to accept a certain sum, or sums of money in lieu of his fees of office, unless he has voluntarily contracted with the police jury to do so.

State ex rel. Barrow, Sheriff, vs. *Fisher, Treasurer*, 514.

SHIPPING.

The part owner of a vessel, not interested in her carrying passengers and property for hire, is not liable as a commercial partner for debts incurred for her running expenses.

B. D. Woods & Bros. vs. *Chas. J. Pickett et al.*, 1095.

The part owner of a vessel can not be held even to a *pro rata* liability on a draft drawn by another part owner in the name of the vessel and her owners, for an insurance of the vessel taken out for the benefit and security of a third person; unless he has authorized, or has ratified the drawing of the draft, or profited by it. *Ib.*

SIMULATION.

See Insolvency and Sale.

STAMPS, U. S.

See Evidence.

SUBROGATION.

Subrogation to a creditor's rights and liens only takes place in favor of a third person who pays the debt, (when such third person has no interest in paying it,) by an express agreement to that effect, entered into at the time of payment. *Brice* vs. *Watkins et al.*, 21.

SUCCESSION.

It is not necessary that a succession which has been accepted with benefit of inventory should be entirely administered and liquidated, before the property of the succession can come into the legal possession of the beneficiary heirs. *Martin Soye* vs. *M. A. Price et al.*, 93.

The legal heirs of a succession, on giving the security prescribed by law, (if so required,) are entitled to be put into possession of the property of the succession when the legatees consent, and the creditors of the succession do not oppose.

Succession of Charles P. Boutte, 128.

The executor of a succession which embraces a plantation among its assets is authorized to employ a competent person to take charge of the plantation, and keep its improvements in proper repair, when it appears from the evidence that it was impracticable to lease the place, and that the services of the keeper enured to the benefit of the property in his charge. A reasonable compensation to the keeper, in such a case, will be allowed as a privilege debt of the succession.

Succession of Celestine Dorville, Widow of Felix Henry Loze, 133.

SUCCESSION—*Continued.*

The omission on the part of an employee to present a statement of account to the employer for services rendered to the employer, will not prevent the former from recovering the value of those services from the employer's succession.

Gaines vs. *Succession of Del Campo, 245.*

The lapse of a legacy, caused by the legatee's death before that of the testator, will not give to the universal usufructuary created by the will, the usufruct of the property embraced in the lapsed legacy. Such property will fall to the legal heirs of the testator, if not otherwise specially disposed of in the will.

Succession of Dougart, 268.

If the purchaser of property at a succession sale wrongfully refuses to comply with the terms of the sale, the administrator of the succession may, after putting the purchaser in default by the tender of an act of sale, cause a second sale at the expense of the purchaser; and the purchaser will be liable for the costs of this second sale, and any loss to the succession caused by the property's selling for a smaller price at the second sale. *Smith* vs. *Kinney, 332.*

An advertisement that "*all* the judgments" belonging to the succession of a certain decedent will be sold, is sufficiently specific to authorize the sale of every such judgment.

Henry Pinard vs. *M. M. George. C. C. Haley, Surety, 384.*

Neither the judgment debtor of a succession, nor the surety on the appeal bond of such debtor, is entitled to notice of the public sale of the judgment against such debtor, made in the course of administration. *Ib.*

The existence of a succession free of debt can not be terminated, and its administration avoided, and the jurisdiction of the probate court thereby divested, by any agreement of the heirs to enter into possession of and divide the succession property, when one of the heirs is a minor, represented by a dative tutor, and one of the major heirs demands an administration.

Mrs. Euphrosine Blake et al. vs. *the Minors Frank Kearney and Ann Eliza Lake, 388.*

Where a surviving husband, who under a judgment in a partition suit, afterwards annulled, has bought certain community property in which he had a fourth, and his children also a fourth undivided interest, subsequently by notarial act pledges to a creditor his and their share of the notes executed by him as vendee in the partition sale, secured by mortgage and vendor's privilege on said property—the mere fact that his children of age join in the notarial act to give their consent to the pledge of the notes, in which they claimed an interest, will not bind them for the debt thus secured, nor will it

SUCCESSION--*Continued.*

amount to their renunciation of the previous mortgage they have on their father's interest in said property, on account of paraphernal claims of their mother.

Mrs. Chatenond and Husband vs. *Evariste Hebert et al.*, *404.*

Funds of the deceased deposited in a bank of a foreign State are a part of his succession, and should be taken into account by the executor in distributing the assets of the succession.

Succession of Bougère, 422.

The question of the widow's right to the marital fourth may be raised and passed on in her opposition to the executor's account, when there are no heirs here, or claiming an interest, and when the universal legatee is present and the account of the executor exhibits the proposed settlement of the succession.

Succession of E. H. Leppelman. On Opposition of the Widow, 468.

When it appears that neither creditors, nor other parties in interest have been cited to oppose a tableau of debts filed by an executor, and that there are no funds to distribute, and no funds had been collected or disbursed, the homologation of such a tableau is not binding on the creditors, or heirs, and they can not be called in by mere publication to establish or oppose it. *Succession of Walter O. Winn, 702.*

A succession can not be bound by a tableau filed by the attorney at law of the executrix, who is absent from the State, and when it appears that the attorney was not specially authorized to file the tableau, and that the executrix was ignorant of what was put down on it.

Ib.

It is only a creditor who has obtained a legal acknowledgment of, or a judgment recognizing his debt, that is entitled to provoke a sale of succession property to pay his debt. *Ib.*

A sale of property which had formerly belonged to a succession, (and which had been validly sold while the succession was in existence) made by the defunct administrator of the succession after it had been closed, and its assets partitioned, is absolutely void, and conveys no title whatever to the purchaser.

Logan vs. *Herbert, 727.*

Where there is an administration of a succession, the estate does not legally pass to a tutor, until the administrator renders his final account. *Rose L. Goux et al.* vs. *Joseph Moucla, 743.*

When the same person is at the same time administrator, and also tutor of a part of the heirs, his possession of the estate must be held to be as administrator. *Ib.*

No such officer as "provisional administrator," is now known to our law. If however such an officer should be appointed by the court,

SUCCESSION—*Continued.*

pending a contest, he has only the functions of a keeper, and may be set aside at the discretion of the court.

Succession of Clark, 801.

Where some of the heirs of a succession are beneficiary, and their debts, and the creditors of the succession, or the heirs of age demand an administration it should be ordered. *Ib.*

Where there are debts of a succession, and other circumstances authorizing the demand for its administration, a partition of its property among the heirs will not be ordered until it has been duly administered. *Ib.*

It is not necessary that the bastard child, born in this State of a slave mother, should have been legally "acknowledged" by the mother, in order to enable the emancipated mother to inherit from said child. *Neel* vs. *Hibard, 808.*

When a testamentary executrix has been destituted of her office, a dative testamentary executor may be legally appointed to administer the succession. *Sharkey* vs. *Bankston, 891.*

When the money paid for the property of a decedent sold by an order of court, has been used to pay his debts, his heir can not reclaim the property without first paying back, or tendering the sum thus used. *Ib.*

The fact that the succession property was sold by order of court, one half cash and the balance on a credit of twelve months, will not, of itself, vitiate the title passed by the sale.

Succession of Lacroix, 924.

The heirs of age of a deceased person are presumed to accept the succession, and his widow to accept the community, unless the heirs renounce the succession, and the widow the community, expressly, and by public act. *Edwards* vs. *Ricks, 926.*

The widow in community is liable for one half, and the heirs of the deceased, each for his virile portion of the other half of the debt due by the deceased on account of a trespass committed by him. *Ib.*

The universal legatee of a succession who has accepted the same, and who has also qualified as executrix, may, in her capacity as owner, make a valid sale of the property of the succession without any order of court authorizing her to act. *Wells* vs. *Wells, 935.*

It is not necessary that the person who has taken unauthorized possession of the effects of a vacant succession, or a part thereof, with intent to convert the same to his own use, should be criminally prosecuted, and convicted of the offense, before a creditor of the succession can institute suit to hold the offender liable for the debt due him by the succession.

Peet, Yale & Bowling vs. *Nalle & Cammack, 949.*

SUCCESSION—*Continued.*

Before an immovable, of which the widow in community and her minor children are the owners in indivision, can be legally sold, or mortgaged, it is necessary that a family meeting, legally constituted, shall set forth in its report that the sale, or mortgage, is of absolute necessity, or of evident advantage to the minors, and give its reasons for its determination.

Jules Mayronne, Tutor, et al. vs. *Eugene Waggaman, et al.*, *974.*

A family meeting, partly composed of one or more persons who have interests in conflict with those of the minors, is not legally constituted. *Ib.*

A stale demand for unliquidated damages on the succession of a deceased, on account of an alleged tort of the deceased, and never made during his life, will not be allowed, except on the strictest proof of its justice. *Succession of Woods, 1002.*

When by the will of a foreign testator property is devised to minors, in this State, under the tutorship of their surviving fathers or mothers, it will fall under the administration of the tutors, or tutrices. Any clause in the will requiring judicial appointment of special administrators to take charge of the property, during the minority of the legatees, will be considered as not having been written.

Succession of Widow L. F. Foucher, Marquise de Circé, 1017.

In order to make a valid appraisement of the undivided interest of an heir in a succession which has been seized under a *fi. fa.*, it is proper to appraise, not each separate effect of the succession, and then estimate the value of his share of such effect, but to appraise his interest as a single, undivided thing, and estimate its value, after deducting the debts and charges of the succession.

Augustus F. Hickman vs. *Gustave J. Freret et al.*, *1067.*

The special mortgage creditor of a succession is entitled to be paid out of the proceeds of the property on which his mortgage rests by preference over the expenses and charges of the administration, only when there are other funds of the succession out of which such expenses may be paid. *Succession of Patrick, 1071.*

The homologation by the clerk of the court of a tableau of the debts of a succession filed by the administrator, on which tableau a certain sum is set forth as due to a certain creditor, does not amount to a judgment for that sum in favor of the creditor, and hence does not authorize him to proceed by rule against the administrator to enforce the payment of the sum.

Aug. Maraist, Syndic, vs. *Honoré Guilbeau, Administrator, 1089.*

The forced heirs of a deceased person, whose *legitime* is impaired by an alleged simulated sale made by the deceased, are not estopped

SUCCESSION—*Continued.*

from attacking the sale on the ground of simulation, but they can only annul the simulated sale to the extent that they are *forced* heirs. *Guilbeau* vs. *Thibodeau*, *1099.*

The purchaser at public sale of succession property on which he has a first special mortgage, is entitled to retain possession of the purchase price, on executing his bond with solvent security in favor of the administrator, for a sum to be fixed by the court, conditioned that he shall pay such sums as may be ascertained, on a settlement of the succession, to be payable by preference to him out of the proceeds of the property so purchased by him, up to the amount of his bid. *A. Tertrou* vs. *C. C. Durand et al.*, *1108.*

When a succession owes no debts, and is composed exclusively of community property, and there is a surviving spouse, an administrator should not be appointed ; and if appointed, a sale provoked by him of the property may be enjoined by the surviving spouse. *Ursule Broussard* vs. *Leo Ditch and Sheriff*, *1109.*

Before the creditors, or the administrator of a deceased vendor who has sold certain real estate by an act under private signature, can annul the act as simulated, it must appear that it injured the creditors, and that their debts existed before the execution of the act. *Honoré Mêche et al.* vs. *D. Lalamie, Administrator*, *1136.*

Heirs who occupy a portion of the succession property are liable to the succession for the rents of such property, during their occupancy. *Succession of Bauman*, *1138.*

Until the rendition of an account, and classification of the debts of the succession, the executor can not, even under an order of court, transfer to one creditor, in compensation or payment of his debt, an asset of the succession. Such a transfer is null and void. *Helena Snyder et al.* vs. *Leonard Cutliff*, *1195.*

Where the vendee of succession property sold on a twelve-months bond fails to pay the price, the executor may resolve the sale, and recover the property. *Ib.*

The child born after one hundred and eighty days after marriage is presumed to be the husband's child. *Harrington vs. Barfield*, *1297.*

A child begotten of a mother who had married in good faith, and before any doubt had arisen in her mind as to the existence of any legal impediment to her marriage, is entitled to all the rights of a legitimate heir of the mother. *Ib.*

Heirs are not chargeable with the rents and revenues of the property which they have possessed and used as sole heirs in good faith, before notice was brought to them of the existence of another heir, previously not heard of. *Ib.*

SUCCESSION—*Continued.*

Minors, who are beneficiary heirs, are not entitled to sue for the recovery of any specific property belonging to the succession of which they are heirs, or the rents of the same, but only for the residuum of that succession, after its debts have been paid. But they are entitled to sue to reduce the amount of the debts of the succession, or to bring into the succession any property which belongs to it, and which may be in the possession of, and claimed by others.

Wm. M. Gillaspie vs. *Citizens' Bank of Louisiana et al.*, *1315.*

SURETIES.

Where two parties appeal from a judgment *in solido*, rendered against them individually, on account of a debt contracted by a commercial firm, then in liquidation, of which they had been the sole members, and their appeal bond is signed in the *firm* name, and also by one of the defendants in his own name, the surety on the appeal bond will be held liable for any judgment on appeal, rendered against the defendant who had signed the bond in his own name. The name of the firm to the bond will be treated as mere surplusage.

John Anderson vs. *John J. Arnette et al.*, *72.*

Under the law of this State the discharge in bankruptcy of the principal on an appeal bond, will not release the surety on that bond from any obligation he incurred by signing the bond.

Serra e Hijo vs. *Hoffman & Co.*, *67.*

The surety who pays the debt of his principal is subrogated, by mere operation of law, to all the rights of the creditors. No act of subrogation by the creditor, in his favor, is required. *Ib.*

The surety on a forthcoming bond can only claim a release from his obligation, because the sheriff has made a return of the *fi. fa.* issued against the principal of the bond before the return day of the writ, by showing that he was injured thereby. And even then he can only claim a release to the extent of the injury proved.

Stewart vs. *Lacoume*, *157.*

The surety on a bond for the release of property provisionally seized by a lessor, becomes liable from the moment he fails to return the released property to the sheriff, when the latter, under a *fi. fa.* against the principal on the bond, makes a demand on the surety. *Ib.*

The surety on an appeal bond, when his principal has been cast on appeal, may be proceeded against by rule for the amount of the judgment when the uncontradicted return of the sheriff on the *fi. fa.* against the principal, shows that after diligent search the principal could not be found; that the surety failed to point out property of the principal after being called on by the sheriff to do so; and that the sheriff could find no property of the principal to levy on.

Pinard vs. *George*, *384.*

SURETIES—*Continued.*

The surety on an appeal bond can not escape his liability on the ground that the sheriff's return on the *fi. fa.* against the principal on the bond was prematurely made, unless he proves that in some form or other that premature return has inured to his injury. To the extent of such injury, and only to that extent he would be discharged. *Ib.*

Sureties who have formally admitted that their principal is dead, and that his succession is insolvent, can not afterward set up a demand for a discussion. *B. & A. Soulé* vs. *Norwood, Administrator, et al.*, 486.

The sureties on a bond given to release property sequestered, have a right, when sued on the bond, to prove that the sequestration was invalid, and illegal; and a refusal to allow them to introduce proof of this illegality, will be such an error as to justify the setting aside of the judgment below. *Carroll & Co.* vs. *Hamilton*, 520.

Sureties on the release bond have the right to prove that the property sequestered does not belong to the defendant in the sequestration suit. *Ib.*

Sureties on the release bond have the right to show that the plaintiff in the sequestration suit had no lien on the property sequestered, in a case where they have alleged fraud and collusion to their prejudice between the plaintiff and defendant in the sequestration suit. *Ib.*

A surety on a release bond who alleges a privilege on the property sequestered superior to the lien of the plaintiff in the sequestration, has a right to prove the alleged privilege. *Ib.*

The sureties on a release bond can not be held for more than the value of the property released from sequestration. *Ib.*

Where a part of the sequestered property has been released by a decree of court, the value of the balance of the property must be proved by the plaintiff in sequestration, before the liability of the sureties on the release *bond can be fixed.* *Ib.*

It is not necessary that the sheriff should call on the principal on an appeal bond to point out property, in order to hold the surety on the bond, when it appears from the sheriff's return that the principal, after diligent search and inquiry, could not be found. *Cooper and Wife* vs. *Rhodes*, 533.

When it appears that the principals on an appeal bond own no property, and that the creditor has taken every reasonable step to exact payment from them, the liability of the surety on the bond will become fixed. *Ib.*

The surety on an appeal bond is liable for the full amount of whatever judgment the Supreme Court may render, without regard to the amount of the judgment appealed from. *Ib.*

SURETIES—*Continued.*

The fact that in the bond given for the release of one charged with crime there is no mention of the offense with which he is accused, nor of any affidavit, information, or indictment pending against him, will not release the surety on the bond.

State vs. *Nicol, Bowman, et al.*, 628.

The sureties on a bond which was given for, and procured the release of a prisoner charged with a criminal offense can not gainsay its regularity, or the regularity of the proceeding in which it was allowed.

Ib.

Where a defendant who is enjoined from collecting the fees of an office, bonds out of the injunction, the surety on the release bond will be bound for the whole amount of the judgment rendered in favor of the plaintiff on account of said fees, unless there be an agreement between the plaintiff and the surety lessening the surety's liability.

Elias George vs. *B. F. Taylor*, 770.

The obligation of sureties on a bail bond is not affected by the fact that the indictment was found for an offense of a higher grade than that expressed in the bond, and which higher crime includes the lower.

State vs. *Tennant*, 852.

It is sufficient, if by the terms of the bail bond, the offense is substantially although not technically described. *Ib.*

Where a mortgage debtor who has taken a suspensive appeal from an order of seizure and sale is cast on appeal, the mortgage creditor, who has subsequently obtained a judgment against the debtor for the balance due after deducting the proceeds of the mortgaged property, has a right of action, for the amount of the judgment, against the surety on the appeal bond of the mortgage debtor, from the moment the return of *nulla bona* has been made on the execution issued under judgment.

D. Landry vs. *François Victor*, 1041.

No recovery can be had against the surety on a release bond, given for the release of sequestered property, on which the plaintiff claims a lien, where the judgment is a merely personal one against the principal on the bond, containing no recognition of the plaintiff's lien or privilege on the property released, nor decreeing a restoration of the property to the plaintiff. *Nalle* vs. *Baird*, 1148.

The sureties on the appearance bond of one committed on a felonious charge are entitled to be released from their bond, after the discharge of the grand jury at the first term of court after the execution of the bond, without finding a true bill.

The State vs. *E. H. Doane et al.*, 1194.

The promise of a surety assuring the payment of the price of a specific lot of goods to be sold to the principal debtor is not a continuing

SURETIES—*Continued.*

guarantee, and hence does not cover other goods subsequently sold to the principal. *Bloom & Co.* vs. *Kern*, *1263.*

Where an appellee, on the ground of the insolvency of the sureties on the appeal bond, has procured a judgment of the district court setting aside the appeal, (which has been filed in this court and not afterwards dismissed,) he can not subsequently pursue the sureties in virtue of a judgment rendered in the case by this court.

A. M. Agelasto vs. *W. R. Mills. Rightor et al., Sureties, 1345.*

The surety on an appeal bond has the right to show in his defense that a legal sale of the principal's property would have satisfied the plaintiff's writ, or that the fraud of the plaintiff prevented its satisfaction. *Lafayette Fire Insurance Co.* vs. *Remmers, 1347.*

SURRENDER OF PROPERTY BY INSOLVENT DEBTORS.

See Insolvency.

TAX-ASSESSMENT AND TAX ASSESSORS.

The power of the arbitrators, to whom the law refers the complaints of taxpayers touching the over assessment of property made by the tax assessors, is limited to ascertaining the value of the property listed on the assessment rolls. They have no power to determine what is, and what is not exempt from taxation, but any award they may make reducing the valuation of property listed, is binding. "Over assessment" means *over valuation.*

State ex rel. N. O. City Railroad Company vs. *the Board of Assessors, 261.*

A mandamus will issue to compel the Board of Assessors to enter on their assessment rolls, the value put by the arbitrators on any property listed on those rolls. *Ib.*

Oral evidence is not admissible to prove the written demand made by a property owner in New Orleans on the Administrator of Assessments, asking for a reduction of the assessment on his property. The written demand itself is the best evidence.

City of New Orleans vs. *Fourchy, 910.*

A tax assessor is not authorized to assess and advertise lands for sale, as the property of an "unknown" person, when it appears that he could, with ordinary diligence, have ascertained who the real owner was.

William E. Rapp vs. *S. M. Lowry. Sarah A. Dorsey et al., Warrantors, 1272.*

TAXATION AND TAX JUDGMENTS.

Property used for school purposes, and the lots appurtenant to and used therewith, are exempt from taxation.

First Presbyterian Church vs. *City of New Orleans, 259.*

TAXATION AND TAX JUDGMENTS—*Continued.*

Property belonging to a church, and used as a parsonage, or rectory, is not exempt from taxation. *Ib.*

Property can not be seized under a *fi. fa.* and sold to satisfy a judgment, for taxes, when the property indicated in the judgment, writ of execution, and advertisement, is merely described as a certain number of lots, in a certain square, between certain streets. Such a description is too vague to identify the property.

Charles Marin et al. vs. *Sheriff and City of New Orleans, 293.*

Writs of *fieri facias*, issued under a judgment for taxes, are not returnable within the delay prescribed for ordinary writs of *fi. fa.* but remain in force until satisfied, or ordered to be returned by competent authority. *Ib.*

The purchaser of property against which no debt for taxes is registered, buys it free from all liens for taxes. Such property is not liable to be seized to satisfy a judgment against its former owner, for taxes which had accrued before he sold it. *Ib.*

The purchase by the State of property sold on account of unpaid taxes, extinguishes the debt and all liens arising from those taxes.

Sarah F. Bradford vs. *A. D. Lafargue, Collector, et al., 432.*

Lands belonging to the State are exempt from taxation, and hence one who purchases lands from the State takes them free from all liens and obligations springing from taxation. *Ib.*

The assessment against a tax-payer is not rendered null by merely omitting from the assessment roll, as exempt from taxation, five hundred dollars worth of personal property, and one thousand dollars of income. *City of New Orleans* vs. *Davidson and Hill, 554.*

The notes, bills, etc., representing the money loaned at interest by a corporation, constitutes a part of its property, and are liable to taxation.

City of New Orleans vs. *the Mechanics' and Traders' Insurance Company, 876.*

One who claims exemption from an income tax on the ground that his income consists of property not liable to taxation, must affirmatively show that his income does so consist.

City of New Orleans vs. *F. P. Fourchy, 910.*

The exemptions from taxation of $500 worth of household furniture, and $1000 of income, do not violate article No. 118 of the constitution of this State requiring taxation to be equal, and uniform. It does not appear that unlawful exemptions of property, or omissions to tax certain property, will affect the validity of an entire assessment. *Ib.*

Retail grocers who have paid their licenses are not entitled, as such, to sell liquor by the glass, bnt are entitled to sell it in quantities less than a gallon, to be consumed out of their stores.

State vs. *Sies, 918.*

TAXATION AND TAX JUDGMENTS—*Continued.*

A planter or manufacturer who keeps such articles of merchandise only as are needed by laborers on his plantation, and sells them only to those laborers, and not to the general public, is not a retail dealer within the meaning of the revenue act, and hence is not subject to the license, or tax imposed on retail dealers.

F. A. Luling vs. *Labranche, Tax Collector*, 972.

A livery stable keeper who has paid as such, his State license tax, can not be compelled to pay an additional license to the State on the hacks and buggies employed him in his business.

Archie P. Williams vs. *A. Garignes, Tax Collector*, 1094.

A claim for taxes by the State will not be allowed when there is no proof of its registry or existence.

A. F. Cochran vs. *Ocean Dry-Dock Company. John L. Sterry et al., Third Opponents*, 1365.

TAX-SALES.

A tax-sale of property, sold under an assessment made in the name of a deceased person to whom the property had not actually belonged, and without any notice served on any person in interest, is utterly without effect; and no judgment subsequently rendered on monition, can impart any validity to the title passed by such a sale.

Fix vs. *Succession of Mrs. Dierker*, 175.

So much of the price, paid by a purchaser of property at a void tax-sale, as was really due on the property for taxes, he is entitled to be refunded. *Ib.*

When a tax collector summarily seizes property and advertises it for sale for arrearages of taxes, and his right to do so is contested, he must specifically show what property he claims taxes on, what is the cash value of that property, and what the per centage on that value. Otherwise he will be enjoined from proceeding in the summary way allowed by the law.

Clinton and Port Hudson Railroad Co. vs. *Tax Collector*, 626.

Act No. 7, passed by the Legislature at its extra session, May 1875, postponed the payment of all taxes then due the State until the first of November, and any sale of lands made by a State tax collector between the passage of said act, and the first of November, 1875, on account of delinquent taxes, is null and void.

Workingmen's Bank vs. *Lannes et al.*, 871.

Before a valid sale of real estate can be made by a State tax collector, on account of unpaid taxes, it is necessary that the owner of the real estate should have had ten days written or printed notice to pay the accrued taxes. *Ib.*

A tax sale of property assessed in the name, and for the taxes of one person, which belongs to another; or made under a seizure record-

TAX-SALES—*Continued.*

ed as against one not the owner ; or made under an advertisement describing it as the property of one not the owner is illegal and void. *Ib.*

In forced alienations without legal process, all the formalities prescribed must be observed, under pain of nullity. *Ib.*

The deed from a tax collector, of property sold at a tax sale, is received *prima facie*, as a valid title. Until the tax sale is set aside by a revocatory, or other proper action, contradictorily with the parties in interest, the title from the tax collector is presumed to be valid.

W. P. O'Hern vs. *Hibernia Insurance Co., 959.*

Tax titles which are not mere simulations can not be attacked collaterally. They are presumed to be valid until annulled in and by a revocatory action.

Jurey & Gillis vs. *Hugh Allison & Co. and Sheriff, 1234.*

While the tax deed to land sold as the property of an unknown person is *prima facie* evidence of a valid sale, yet, in the absence of recital in the deed, and proof *aliunde* of the appointment of a curator to represent the unknown owner, and of service of the twenty-days notice on the curator, the sale of the land by the assessor is absolutely void. A vendor of property can not subsequently acquire an outstanding title superior to the one he conveyed, and in virtue of this superior title oust his vendee of the property.

Rapp vs. *Lowry, 1272.*

A debtor whose property has been seized, sold, and bought in by his mortgage creditor, can not subsequently acquire a tax title to the property, to the prejudice of the creditor, in virtue of a sale made by the tax collector, for taxes assessed in his name, and which had accrued on the property while he was the owner.

John Magner vs. *the Hibernia Insurance Co., 1357.*

TAX-TITLES.

See Tax-Sales.

TAX COLLECTORS.

Up to the year 1877, the State tax collector was prohibited from paying over any school taxes collected by him, to any one but the treasurer of the School Board, and his payment of any portion of those taxes to the parish treasurer, prior to the year 1877, did not discharge him from liability for them. But when it appears that such payment of school taxes to the parish treasurer was made by a collector in good faith, and was approved by the police jury, and inured to the benefit of the parish, the parish should re-imburse to him the amount thus unduly received.

Board of School Directors vs. *O. Delahoussaye, Sr., 1097.*

TAX COLLECTORS—*Continued.*

Where a tax collector is superseded, and his successor collects part of the taxes embraced in the tax rolls, and blank licenses put into his hands, the outgoing collector and his sureties will be liable only for the amount collected by him, and not accounted for; which amount must be proved by the State.

State ex rel. Merchant vs. *Taylor Daspit et al.*, *1112.*

THIRD OPPOSITION.

See Practice and Pleading.

THIRD PERSONS—IN CONTRACTS.

See Contracts.

TUTORS.

Unless opposed by creditors, or heirs of age, the natural tutor of minors may take in charge and administer, as tutor, the property of the minors; and his possession of the property, in contemplation of law, is their possession. *Soye* vs. *Price et al.*, *93.*

The legal representative of the minors' heirs of a decedent may enjoin the administrator of the succession from selling any property of the succession, to satisfy a judgment against the decedent which is null and void. *Bienvenu* vs. *E. T. Parker*, *160.*

The general mortgage on the property of a tutrix, in favor of her minor child, may, on the advice of a legally constituted family meeting duly homologated, be legally postponed in favor of a special mortgage on the property, executed by the tutrix in order to obtain means to make repairs, and pay taxes on the property, and provide for the proper maintenance, and education of the minor. And where the minor has enjoyed the benefit of the money borrowed by the tutrix on such special mortgage, the minor will be thereafter estopped from interfering with any rights of property acquired under said special mortgage, or derived from its foreclosure.

Pauline Beauregard vs. *Theodore Leveau*, *302.*

The tutor who received the proceeds of the sale of slaves, the property of the minors under his tutorship, some time before the late civil war, is liable to the minors for the amount of those proceeds.

B. F. George vs. *N. Amacker*, *390.*

Where an heir who opposes the account filed by his former tutor, admits that he had received a certain sum of money from his tutor, but alleges that it was derived from a source different from the one set forth by the tutor, he must prove his allegation, or otherwise his admission will dispense the tutor from any other proof.

Isaac D. Brown vs. *Joseph Bessou, Administrator*, *737.*

The legal mortgage of minors on the property of their tutors, is good, as against the tutor, their heirs, or partners in community, without being registered. *Ib.*

TUTORS—*Continued.*

A tutor can not be held for more than he collected of a certain debt due the minor, when it is not shown that the debt was worth more than he collected. *Ib.*

Where a natural tutor, without authority from the court, borrows money for his own account and in his individual name, and expends the money on improvements of a plantation owned in common by him and his minor children, but which improvements were for the use and benefit of a planting partnership in which the minors had no interest, the minors can not be made liable for the borrowed money to the lender of the same.

Mary A. Querin, Administratrix, vs. *E. Carlin, 1131.*

And a subsequent mortgage of the minors' property to secure such a debt will not be binding, although authorized by the proceedings of a family meeting homologated by an order of court. *Ib.*

Where a settlement is made after the termination of a tutorship, by which the former ward accepts the former tutor's individual obligation, payable at a distant day, in lieu of the security of his bond, and the legal mortgage resulting from its record, the former ward loses all recourse on the property of the tutor which has passed into the *bona fide* ownership of a third person.

Kelly vs. *Sandidge, 1190.*

USUFRUCT.

Where a legacy in full property left by a husband to his widow is reduced, under article 1752 of the Civil Code to one of usufruct merely, the usufruct shall embrace one fifth of the husband's whole estate.

Succession of Bollinger, 193.

When the property of a legacy left by a deceased husband devolves on his legal heirs, on account of a lapse of the legacy, his widow will be entitled to the usufruct of the property, and hence not liable for its revenues. *Succession of Dougart, 268.*

The usufructuary may at any moment renounce his usufruct. *Ib.*

Prescription does not begin to run against the claims of the usufructuary, on account of debts paid by him for which the property subject to the usufruct was liable, until the expiration of the usufruct. *Ib.*

VENDORS AND VENDEES.

See Sale.

WIDOWS.

Before a widow can rightfully claim the marital fourth from the succession of her husband she must show that her husband was rich, and left her in necessitous circumstances. If she fails to prove *either* of those essential facts her claim to the marital fourth will be rejected. *Succession of Leppelman, 468.*

WIDOWS—*Continued.*

Where the succession of a deceased husband, which is wholly composed of his half of the community property, the other half of which belongs to his surviving widow, is entirely free from debts, or only owes such trifling debts as she offers to pay, the appointment of an administrator of his succession is unnecessary, and illegal. The surviving widow has the right to take possession of the whole property and exclusively administer it, as the owner of one half of it, and as the usufructuary of the other half.

Lewis Burton and Wife vs. *O. Brugier and Sheriff*, 478.

The Probate Court has no authority to order a sale of the surviving wife's half of community property at the instance of an administrator of the husband's succession, illegally appointed by that court, in order to pay debts of the succession wrongfully created by the administrator. *Ib.*

An order of court to sell the property of the husband's succession to pay its court costs and law charges, does not authorize the sheriff to sell the widow's half of the property. *Ib.*

The agent of a widow, acting solely in virtue of a mandate executed by her while she was a married woman, can not bind her to any greater extent, as a widow, than he could have bound her as a married woman. *Calhoun* vs. *Mechanics' and Traders' Bank*, 772.

The clause of a husband's will, by which his wife is constituted his universal legatee, on condition that if his sister survived his wife she should be entitled to have a certain sum from the wife's succession, does not involve a *fidei commissum*, or prohibited substitution. And hence on the death of the wife, who had accepted the husband's bequest, with the charge on it, the surviving sister of the husband has a right to claim the sum from the wife's succession.

Succession of Mrs. P. J. Michon. Opposition of Mrs. Louis Ducourneau, 213.

Testaments made in other States can not be carried into effect on property in this State, until registered in the court within whose jurisdiction the property is situated, and their execution ordered by the judge. *Succession of Frances Parke Butler*, 887.

A foreign will, when duly authenticated, and admitted to probate at the testator's domicil, is entitled to be admitted to registry and execution in this State. *Ib.*

A devise, by which property left to a minor is put in the possession and under the control of a third person until the majority of the minor, involves a *fidei commissum*, which is prohibited by our law.

Succession of Foucher, 1017.